IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 240

Nos. 189, 302, 320, 546, 547, 571 and 638,

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL., *Petitioners*,

v.

JEWEL TEA COMPANY, INC., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 331 F. 2d 547 (R. 691-698). The opinion of the District Court is reported at 215 F. Supp. 839 (R. 661-678). The prior opinion of the Court of Appeals on the interlocutory appeal, affirming denial of the motion to dismiss the com-

plaint, is reported at 275 F. 2d 217, cert. denied, 362 U.S. 936. The initial opinion of the District Court, holding that the complaint was sufficient to withstand a motion to dismiss, is reported at 36 CCH Lab. Cas. ¶65, 344 (R. 58-65).

JURISDICTION

The judgment of the Court of Appeals was entered on April 27, 1964 (R. 699). The petition for a writ of certiorari was granted on October 12, 1964 (R. 701). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Collective bargaining agreements governing employment terms of meat departments in retail food stores in the Chicago area provide that market operating hours for the sale of fresh meat shall be from 9:00 a.m. to 6:00 p.m., Monday through Saturday. With variations as to the specific hours, regulation of market operating hours by collective bargaining agreement has existed in the Chicago area since 1919. The order granting certiorari limited the questions to the following two (R. 701):

1. Based on the District Court's undisturbed finding that the limitation "was imposed after arm's length bargaining, . . . and was fashioned exclusively by the unions to serve their own interests—how long and what hours members shall work, what work they shall do, and what pay they shall receive" (R. 672), whether the limitation upon market operating hours and the controversy concerning it are within the labor exemption of the Sherman Antitrust Act.

2. Whether a claimed violation of the Sherman Antitrust Act which falls within the regulatory scope of the National Labor Relations Act is within the exclusive primary jurisdiction of the National Labor Relations Board.

STATUTES INVOLVED

The pertinent provisions of the Sherman Antitrust Act (26 Stat. 209, 15 U.S.C. § 1), the Clayton Act (38 Stat. 738, 15 U.S.C. § 12), the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. § 101), and the National Labor Relations Act (61 Stat. 136, 29 U.S.C. § 151) are set forth in Appendix A, *infra*, pp. 119-126.

STATEMENT

I. THE PARTIES TO THE ACTION; THE GIST OF THE COMPLAINT; THE PROCEEDINGS IN THE COURTS BELOW.

Respondent Jewel operates food stores in Chicago and an area fanning from it through its Jewel Food Store Division, one of six divisions comprising its total business structure (R. 342-343, 344-348, def. exs.[1] 9, 10). Jewel first entered the food store business in Chicago in March 1932, and first began to operate meat departments in its Chicago stores in 1933 or 1934 (R. 313, 315).

Petitioners are seven local labor unions, composed of butchers or meat cutters, and their named officers and representatives. Each union is a separate autonomous labor organization (R. 573). Of the seven, Local 189 occupies a special position, and is divided for contract purposes into six different geographic groups denominated 1, 1A, 2, 3, 3A and 4 (R. 352-353). The territorial jurisdiction of the seven unions, but including only group 1 of Local 189, is confined to the Illinois area embracing Chicago and the suburban perimeter surrounding it (R. 348, 83-87, 1x.[1a]).

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[1] In this brief "def. ex." refers to the union's exhibits, "pl. ex." to Jewel's exhibits, and "Tr." to the original transcript of testimony. Occasional reference is made to these when the matter is not included in the printed record.

[1a] The record is printed in two volumes. One volume, paginated 1 to 702, contains the pleadings, testimony, and proceedings below. The other volume, paginated 1 to 254, contains the exhibits. To differentiate the two, reference to the page number of an exhibit is followed by the letter "x."

In this brief this territory will be called the Chicago area. It is not coterminous with, but is instead a smaller area contained within, the territory occupied by Jewel Food Store Division (R. 344-348, def. exs. 9, 10). Within the Chicago area virtually all qualified meat cutters are members of the unions (R. 90). Local 546 has 5,000 members; Local 547, 700 members; Local 638, 700 members; Local 571, 240 members; Local 320, 650 members; Local 262, 450 members; and Local 189, group 1, 475 members (R. 1x, 84-86, Tr. 149).

Associated Food Retailers of Greater Chicago is a not-for-profit employer association representing independent food stores in collective bargaining, and Charles H. Bromann is its secretary and treasurer (R. 17, 74).

The complaint alleged a conspiracy in violation of the Sherman Act among Associated, its members, and its secretary and treasurer to eliminate competition in the sale of fresh meat after 6:00 p.m., by insistence that all collective bargaining agreements between food store operators and the unions within the Chicago area shall contain a provision limiting marketing operating hours from 9:00 a.m. to 6:00 p.m., Monday through Saturday; and it further alleged that this conspiracy was aided and abetted by defendant unions, their members, and their officers and representatives as co-conspirators (R. 14-27). Upon interlocutory appeal the Court of Appeals affirmed the District Court's determination that the complaint was sufficient to withstand a motion to dismiss. *Jewel Tea Co.* v. *Local Unions*, 274 F. 2d 217, cert. denied, 362 U.S. 936. It held, first, that the activity attributed to the defendants was not within the exclusive primary jurisdiction of the National Labor Relations Board (*id.* at 220-221), and, second, that a trial was required to determine whether the alleged restraint (a) was within the labor exemption of the Sherman Act, (b) constituted an unreasonable regulation of trade, (c) affected interstate commerce, (d) injured Jewel, and (e) was within the com-

petence of Jewel to assert because not *in pari delicto* (*id.* at 221-224).

At trial, upon conclusion of Jewel's case, the District Court dismissed the complaint against Associated and Bromann for want of any evidence of conspiracy (R. 683-684, 658). Based on the view that "Jewel has sought relief from the defendant Unions apart from the theory of conspiracy," the District Court did not grant their contemporaneous motion to dismiss (R. 684, 662). At the conclusion of the whole case, "on the basis of the entire record" (R. 662), the District Court dismissed the complaint against the unions and their officers and representatives, holding that "the purport, history and effect of the controverted provision indicates that it is within the labor exemption of the Sherman Act, . . . and that it imposed no 'unreasonable' restraint on trade" (R. 678). In addition, as part of its rationale that the regulation of market operating hours was reasonable, the District Court found that the evidence did not "in any way establish that less meat is consumed in this area, in proportion to population and income, because of the restriction, than in areas where fresh meat is sold at night. In fact, the objective statistics indicated that the restriction had no discernible effect" (R. 676). The District Court did not explicitly relate this finding to the unions' position that the limitation was outside the purview of the Sherman Act because it did not adversely affect the interstate inflow of meat into the Chicago area market. The District Court expressly withheld decision upon two issues, stating that since "there is no violation of the Sherman Act the court need not consider whether plaintiff sustained any injury to its business, or whether it was in pari-delicto with the defendant unions" (R. 678).

The Court of Appeals reversed. It did not disturb any findings of fact, noting that "there are no factual disputes revealed by the evidence," and "no question as to

the credibility of any witnesses on any issue which we consider relevant . . ." (R. 693). It held that the determination of market operating hours was an inherent management function to be exercised exclusively by the proprietor, and that a collective bargaining agreement on the subject established, without more, forbidden concert among labor and non-labor groups in violation of the antitrust laws (R. 693-695, 696-698). It further held that the limitation was outside the rule of reason because it did not promote competition (R. 695). In addition, without any particularization of reasons, the Court of Appeals held that Jewel "has been injured in its business and property," and that the limitation exerted an "unlawful restraint on interstate commerce" (R. 696). It held, finally, that strike authorization voted by the union members, regardless of any other circumstances, established that Jewel was not *in pari delicto* (R. 696). In the case of Associated and Bromann, the Court of Appeals reversed and remanded "for such further proceedings as may be consistent with this opinion"; in the case of the unions and their officers and representatives, the Court of Appeals reversed and remanded with directions "to enter a declaratory judgment and an injunction substantially as prayed in the complaint herein and to ascertain and award to plaintiff such monetary relief as may be appropriate under this court's opinion" (R. 697-698).

II. THE SERVICE AND SELF-SERVICE METHODS OF VENDING MEAT; CERTAIN PROVISIONS OF THE AGREEMENTS PERTAINING TO IT; AND THE COMPOSITION OF EMPLOYERS ENGAGED IN VENDING MEAT WITHIN THE CHICAGO AREA.

Consideration of the controversy will be facilitated by a preliminary statement of the service and self-service methods of vending meat, certain provisions of the collective bargaining agreements pertaining to it, and the composition of employers engaged in vending meat within the Chicago area.

Fresh meat is sold in a meat department of a retail food store through either the service or the self-service method. In the service method the customer places her order with the butcher who personally waits upon the customer in filling it (R. 459, 366). In the self-service method the butchers cut, trim, weigh and package the meat; place a label on the package showing the kind, weight and price of the cut; and put the packaged retail cut into a refrigerated counter from which the customer makes her selection (R. 551, 117-118). The personal service given to a customer in a service market is usually provided in a self-service market through the availability of butchers to furnish custom cutting and other personal attention required by the customer (R. 549, 118, 486-488, 489-490). In its own operation of its self-service markets Jewel states as "a must" that there be "a man on the counter at all times . . ." (R. 486); Jewel requires a butcher at the counter "to create . . . a friendly and courteous atmosphere between the meat cutters and the customer"; "to keep the counter straight, perform any services which the customer might request and fill special requests that the customer might want that she can't find in the counter" (R. 487-488).

Corresponding to this difference in vending meat, the employment terms of butchers within the Chicago area are governed by two separate collective bargaining agreements, one known as a "Service Contract" and applicable to "Service Meat Markets," the other known as a "Self-Service Contract" and applicable to "Self-Service Meat Markets" (R. 142, 17x, 18x).[2] The differentiation into service and self-service contracts began with the agreements for the term beginning December 1, 1952 (cf. R. 144x, 149x with R. 140x), and signalled the advent into the Chi-

[2] This is true except for Local 189, which executes a separate and varying agreement to meet conditions peculiar to it (R. 142, 352-353, 410-411).

cago area of the self-service method of vending meat late in 1952 (R. 564, 157). Each contract identically defines the distinction between a service and a self-service market (R. 17x, 18x, § 1.2(d)). "A self-service market is one in which fresh beef, veal, lamb, mutton or pork are available for sale on a pre-package self-service basis" (*ibid.*). So long as any fresh meat is sold on that basis the market is classified as self-service; the market is given that classification "even though there is also a service counter offering custom cutting for those who prefer it" *(ibid.) The choice whether to use the service or self-service method of vending meat is committed exclusively to the employer's decision;* the service and self-service contracts both explicitly stipulate that "the Employer shall have the sole discretion of determining from time to time which system of merchandising, service or self-service, shall be utilized in each of the Employer's markets; provided that the Employer shall comply with the wages, hours and other contractual conditions of employment pertaining to the system of merchandising used in that market" (R. 17x, 18x, § 1.1).

This freedom to choose the method of merchandising preferred by the particular employer is reflected in the highly variegated and shifting composition of meat markets actually in operation. During the same approximate period in 1957 and 1962, within the Chicago area, food stores vending meat operated the following number of service and self-service markets and employed the designated number of butchers in each type of market (R. 34x):

Employer	As Of	Self-Service Markets	Self-Service Employees	Service Markets	Service Employees	As Of	Self-Service Markets	Self-Service Employees	Service Markets	Service Employees
Jewel Tea	12/28/57	157	1,192	25	86	12/20/61	206	1,318	15	50
National Tea Co.	9/27/57	115	*	121	*	1/ 2/62	162	766	22	45
Great Atlantic & Pacific Tea Co.	9/ 2/57	90	**	54	***	1/ 2/62	117	570	28	73
High-Low Foods, Inc.	9/ 2/57	11	100	27	116	1/ 2/62	26	230	27	116
Wieboldt Stores, Inc.	10/12/57	2	14	5	35	1/ 6/62	5	35	2	12
Eagle Food Centers, Inc. (including Eagle and Piggly Wiggly Stores)	9/ 2/57	1	8	0	0	1/ 2/62	13	42	0	0
Sure Save Food Market	9/ 2/58	4	22	2	4	1/ 2/62	9	47	1	3
Fair Store	9/ 2/57	0	0	1	4	1/ 2/62	0	0	1	2
The Kroger Co.	9/ 2/57	39	169	28	60	1/ 2/62	45	203	2	6

* 518 employees employed in both service & self-service markets without a breakdown between them.

** 90 head meat cutters; figures not available for journeymen and apprentices.

*** 54 head meat cutters; figures not available for journeymen and apprentices.

Still other food stores vending meat within the Chicago area operated the following number of service and self-service markets in 1957 and at the time of trial (R. 446-447, 606-608):

Employer	1957		At Time of Trial	
	Self-Service Market	Service Market	Self-Service Market	Service Market
Del Farm Stores	11	1	Sold Stores to National Tea in 1958	
Hillman	7	3	12	1
Goldblatt	0	9	Discontinued operation of meat departments.	
Save-Way	1	0	2	0
Pick and Save	7	0	10	0
Mayflower	1	0	2	0

In 1961, the number of Associated's members who authorized its secretary and treasurer Bromann to sign on their behalf the collective bargaining agreements reached that year with the unions was 313 (R. 599). The same mixed character of marchandising exists among the food store operators who are members of Associated as among nonmembers. Associated includes among its members those who operate a single food store and those who operate more than one store (R. 608-609). Of those who operate a single store, some operate the meat department in that store on a self-service basis and others on a service basis (R. 608). Of those who operate multiple stores, some operate all the meat departments in the stores on a self-service basis, others operate some of the meat departments on a self-service basis and others on a service basis, and still others operate all the meat departments on a service basis (R. 608-609). For example, all being members of Associated, Sure Save in 1961 operated ten self-service markets and one service market (R. 413-415), Save Way in 1962 operated two self-service markets (R. 607), Pick and Save in 1962 operated ten self-service markets (R. 607-608), and Mayflower in 1962 operated two self-service markets (R. 608).

III. THE TERMS OF THE 1961-1964 AGREEMENTS PERTAINING TO RECOGNITION, WORK JURISDICTION, WORKING HOURS, AND MARKET OPERATING HOURS.

The term of the most recent service and self-service contracts runs from October 8, 1961 to October 3, 1964 (R. 17x, 18x, § 10.1). Under each contract the employer recognizes the union as the exclusive bargaining representative "of all employees in the meat department of said Employer who process, pack, wrap, handle and sell frozen and fresh meats on Employer's premises . . ." (R. 17x, 18x, § 2.1). With minor exceptions both contracts require that the work entailed in the preparation and sale of meat shall be performed exclusively by the meat department employees represented by the unions (R. 18x, §§ 2.2, 2.3, R. 17x, § 2.2). The work of a butcher in a self-service meat market includes replenishing and rearranging the stock in the counters and cleaning the counters (R. 578).

Both contracts provide that "eight (8) hours shall constitute the basic workday which shall be scheduled to begin no earlier than 8:00 a.m. and to end no later than 6:00 p.m.", with one hour "allowed for lunch . . . to begin no earlier than 11:00 a.m. and to end no later than 2:00 p.m." (R. 17x, 18x, § 4.1). Each also provides that "At the Employer's discretion overtime at overtime rates may be worked after eight (8) hours in any one day and behind locked doors after 6:00 p.m." (R. 17x, 18x, § 4.4). Performance of overtime after 6:00 p.m. is "relatively rare" (R. 550); there is "Practically none" (R. 601).[3]

Corresponding to this limitation on working hours, both contracts provide that "Market operating hours shall be

[3] Performance of overtime "behind locked doors after 6:00 p.m." is occasioned by such situations as the need in some stores to cut meat the night before in order to deliver early morning orders, advance preparation to meet the requirements of a special sale or of a heavy day preceding a holiday, or to refrigerate a late arrival of a load of meat (R. 549-550, 601).

9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above . . ." (R. 17x, 18x, § 5.1). Sale of certain products after 6:00 p.m. other than fresh beef, veal, lamb, mutton or pork is authorized (R. 18x, § 5.2, R. 17x, § 2.2).[4] The agreement to which Local 189 is a party provides for the same limitation upon market operating hours from 9:00 a.m. to 6:00 p.m., Monday through Saturday, in group 1, but establishes no limitation upon market operating hours in other groups (R. 142, 349, 87-88).

At Jewel's instance (R. 388), in accordance with its consistent policy (R. 387-388, 401), the self-service contract provides "that in the event the market operating hours of service markets are extended at any time during the term hereof, the extension shall likewise apply to the market operating hours of self-service markets" (R. 18x, § 5.1). It also provides that (R. 18x, § 8.6):

> The Union agrees that during the term of this Agreement it will not enter into a contract with any other employer which grants to such other employer the

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[4] The excepted products are: "(1) Sliced packaged bacon and Canadian bacon, canned and glassed meats of all kinds, and all meats not for human consumption (being those products excepted from the Union's jurisdiction over sale); (2) All delicatessen meats including: (a) Ready to eat prepared meats, poultry and fish; (b) Sliced boiled, baked or barbecued ham; (c) Sliced packaged dried beef; (d) Smoked sausage; (e) Fresh pork sausage; (3) Frozen fresh poultry, cut-up or whole; (4) Fresh poultry, cut-up or whole, processed on the premises; (5) Frozen packaged fish; (6) Smoked butts, smoked ribs and smoked hocks; (7) Frozen specialty meat items such as frozen and formed (flaked or chopped) patties and choppettes, with or without butter or vegetable, breaded or unbreaded." Sale of these products after 6:00 p.m. from self-service cases is authorized upon the condition that they be stocked in the cases by meat department employees before 6:00 p.m. and not be stocked or handled by any employees after that hour (R. 18x, § 2.2, 2.3, R. 17x, § 2.2).

> right to operate self-service markets for lesser wages or longer hours or any other condition of employment or market operation more favorable to such other employer than those contained in this Contract except upon the condition that this Employer shall receive the benefit of any more favorable terms granted to such other employer.

Each provision originated in this identical form with the negotiation of the first self-service contract in 1952 (R. 145x, 148x, arts. IV, XIX). Each provision had been drafted by Jewel for inclusion in the 1952 agreement (R. 388). It has been Jewel's position throughout that no employer should have more favorable terms than any other employer (R. 387-388, 401).

IV. REGULATION OF MARKET OPERATING HOURS BY COLLECTIVE BARGAINING AGREEMENT IN AREAS OTHER THAN CHICAGO.

Regulation of market operating hours by collective bargaining agreements is not confined to the Chicago area, but exists elsewhere throughout the country, covering territories with a population of 3,717,208 (Appendix B, *infra*, pp. 127-130). Included are the major metropolitan areas of Cleveland, Seattle, and St. Paul (*infra*, pp. 127-129, 130). In Cleveland, the closing hour of 6:00 p.m., which has existed at least since 1945, applies to the entire store, and not to the meat department alone (*infra*, p. 127).

V. THE HISTORY OF THE CONTRACTUAL LIMITATION OF MARKETING AND WORKING HOURS IN THE CHICAGO AREA, AND ITS APPLICATION TO JEWEL THROUGHOUT THE LATTER'S OPERATION OF MEAT MARKETS IN THAT AREA.

Local 546 was formed in 1914 (R. 443). Its territorial jurisdiction—Chicago and environs—was about the same then as now (R. 443-444). In Chicago in 1910 the operating hours of a meat market were 7:00 a.m. to 7:00 p.m., Monday through Friday, 7:00 a.m. to 10:00 p.m., on

Saturday, and 7:00 a.m. to 1:00 p.m., on Sunday (R. 443). The butcher worked the full 81-hours, 7-days per week that the market was open for operation (*ibid.*). These hours continued until November 1919 (*ibid.*).

On November 1, 1919, Local 546 called a strike of the meat cutters in Chicago (R. 444). The objective of the strike was "more money and less hours" (*ibid.*). The Union "wanted to cut off an hour in the morning and an hour at night, and no Sunday hours", with the result that the hours would be 8:00 a.m. to 6:00 p.m., Monday through Friday, and 8:00 a.m. to 9:00 p.m., on Saturday (R. 445).

The strike lasted eight days (R. 445). At its conclusion the operating hours of meat markets in Chicago were established at 8:00 a.m. to 6:00 p.m., Monday through Friday, and 8:00 a.m. to 9:00 p.m. on Saturday (*ibid.*). The standard collective bargaining agreement entered into by Local 546, for the term of November 1, 1920 to October 31, 1921, "governing Meat Cutters in Retail Meat Markets in the City of Chicago, Illinois, and Suburbs," provided in part that (R. 115x, 576):

> Article 1. Nine hours shall constitute the basic working day, hours shall be 8 A.M. to 6 P.M. excepting Saturdays and days preceding holidays beginning at 8 A.M. and quitting at 9 P.M., allowing one hour for dinner and one-half hour for supper. Employees must be dressed and ready for work at 8 A.M.
>
> Article 2. *It is expressly understood that no customers will be served who come into the market after 6 P.M. and 9 P.M. on Saturdays and on days preceding holidays*, that all customers in the shop at the closing hour be served, that all meats be properly taken care of and markets placed in a sanitary condition, such work not to be construed as overtime. Overtime to be limited to one hour every day and *shall be performed behind locked doors* at the rate of $1.50 per hour. Employees are required to notify the Secretary of Local 546 of such overtime. [Emphasis supplied.]

Article 3. There shall be no work on Sundays, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day or New Year's Day.

The hours established by the 1919 strike continued until 1937 when they were reduced (R. 445). In 1937, by agreement, marketing and working hours were set at 8:30 a.m. to 6:00 p.m., Monday through Friday, and 8:30 a.m. to 7:00 p.m., on Saturday R. 116x, arts. 1, 5). A further reduction took place in 1941. The marketing and working hours were in that year by agreement established at 8:30 a.m. to 6:00 p.m., Monday through Saturday, thus eliminating the longer Saturday (R. 117x, arts. 1, 5). Another reduction occurred in 1945. In that year, by agreement, marketing and working hours were set at 8:30 a.m. to 6:00 p.m. Monday through Friday, and 8:30 a.m. to 3:00 p.m. on Saturday (R. 121x, 122x, arts. III, VII). A further reduction was effected the next year. In 1946, by agreement, marketing and working hours were fixed at 9:00 a.m. to 6:00 p.m., Monday through Friday, and 8:00 a.m. to 1:00 p.m. on Saturday (R. 124x, 125x, arts. III, VII). In 1947, the short day on Saturday was discontinued, and the ending time for marketing and working was by agreement set at 6:00 p.m., Monday through Saturday (R. 128x, 129x, arts. III(c), VII(a)). The hours thus established in 1947 continue to the present (R. 132x, 133x, 136x, 137x, 140x, 141x, 149x, 150x, arts. III(c), VII(a); R. 145x, 153x, 154x, arts. III(a), IV; R. 163x, 168x, 35, 37, 49, 51, 7x, 8x, 13x, 14x, arts. 4(1) 5).

The history of hours regulation set forth in the preceding paragraph is taken from the agreements of Local 546. At least since 1931, the agreements of all the other unions, including only group 1 of Local 189, contained provisions which set market operating hours that were identical with those established by the Local 546 agreements (R. 575, 610).

From the inception in 1933 or 1934 of Jewel's operation of meat markets within the Chicago area, Jewel has

entered into collective bargaining agreements with the unions covering its meat markets; these agreements set the market operating hours to prevail in Jewel's meat departments; these market operating hours were identical with those set by the agreements entered into by the other employers in the Chicago area; and Jewel has throughout operated its meat departments in conformity with the marketing hours established by the agreements (R. 578, 315-316).

VI. THE METHOD OF JOINT BARGAINING BETWEEN THE UNION GROUP AND THE EMPLOYER GROUP IN THE CHICAGO AREA.

The embedment of the subject of market operating hours in wages, hours, and working conditions is shown in significant part by the negotiations pertaining to it in 1957, 1959, and 1961. An understanding of the negotiations will be facilitated, and their arm's-length character revealed, by a preliminary statement of the method of bargaining which prevails in the Chicago area.

In preparation for negotiations, at group meetings of the staffs of the unions, a survey form is prepared which is used by the union business agents, in the course of their frequent visits to the meat markets, to ascertain the wishes of the members on the subject of contract terms. Each union then prepares a list of contract demands. At an ensuing group meeting of the seven unions the seven separate demands are reduced to one final set of contract proposals. (R. 593-594.) In the bargaining which follows the unions are represented by a negotiating committee composed of 17 to 23 representatives (R. 575). R. Emmett Kelly, secretary-treasurer of Local 546, is chairman of the unions' negotiating committee and speaks for it (R. 89, 143, 355, 407-408). From time to time in the course of bargaining the union group will caucus to determine the position it should take in negotiations (R. 409, 139-140). And during negotiations the unions ascertain

the wishes of the members by the visits of the business agents to the meat markets and at the regular union meetings (R. 594).

Bargaining commences with a call of a meeting of the employers by R. Emmett Kelly at which the unions' contract demands are presented. (R. 408). A further meeting is then scheduled at which to begin to negotiate the demands (*ibid.*). In advance of negotiations the employers meet among themselves to explore the objectives they seek in negotiations (R. 409). They designate a chairman to speak for them; in meeting with the unions, unless an employer is absent from the meeting or specifically disclaims the position taken, the employer chairman speaks for the entire employer group (R. 408-409, 368, 517-518, 524-525). The employer chairman may change from meeting to meeting, as in the 1957 negotiations, or a single employer chairman may act for the duration of the negotiations, as in the 1959 and 1961 negotiations (R. 367-368, 408-409, 139). In the course of negotiations the employers caucus from time to time to determine the position the employer group should take (R. 409, 139-140).

When agreement is reached between the employer group and the union group, its terms are presented to the members of the unions for approval at a contract ratification meeting held by each union (R. 409-410, 593). These meetings are customarily held on Sunday to assure maximum attendance (R. 593). In preparation for the meetings R. Emmett Kelly prepares an outline of the proposals and counterproposals made in the course of the negotiations for his use at the Local 546 meeting and for the use of the other representatives at the meetings of the other unions (R. 588-589, 590, 598). At the Local 546 meeting the negotiations in their entirety are reviewed with the members prior to submission to a vote (R. 589). As the largest of the unions, and in order that the other unions may be guided by developments at the Local 546 meeting, the

contract ratification meeting of Local 546 is begun one-half earlier than the other ratification meetings, and the other unions are apprised by telephone of the progress of the Local 546 meeting (R. 591).

After ratification by the members, a committee of the employer group and the union group meets to draft the precise language to reflect the understanding reached (R. 410). When a draft in final form is adopted it is set up in galley proof; further corrections are made and the agreement is reduced to final printed form (*ibid.*). The employers and unions then sign separate but identical agreements (*ibid.*).[5]

As a method of bargaining joint negotiation between an employer group and a union group was first instituted in 1941 (R. 573-574). Joint negotiation was adopted in order to strengthen the bargaining position of the unions (R. 574-575). Before 1941, as the largest of the unions, Local 546 did the bargaining, and whatever resulted from its negotiations was generally passed on to the other smaller locals (R. 574, 610). In the process some of the smaller local unions had fallen behind in wages and other conditions of employment (R. 575, 610). It was decided that the best way to bring the lagging locals to the same level was by group bargaining (R. 575).

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[5] This procedure prevails as to all the unions except Local 189. Local 189 participates in the joint negotiations together with the other unions (R. 352-353). However, because of varying problems unique to Local 189, while some elements of the Local 189 agreement are concluded as part of the principal negotiations, the employers seek to defer negotiations with Local 189 until the end of negotiations with the other unions (R. 353, Tr. 1079). An agreement with Local 189 is usually reached within thirty days of the completion of negotiations with the other unions (R. 410-411).

VII. THE 1957, 1959, AND 1961 NEGOTIATIONS AS THEY RELATE TO THE SUBJECT OF MARKET OPERATING HOURS

We now set forth a statement in detail of the negotiations in 1957, 1959, and 1961 as they relate to the subject of market operating hours.

A. The 1957 Negotiations

1. On July 25, 1957, the unions gave notice of their desire to negotiate new contract terms. On August 8, the unions scheduled a meeting for August 20 to submit the unions' proposals. At the meeting on August 20 the unions presented and explained their demands to the employers. (R. 353-354, 35x-39x.)

2. E. T. Vorbeck is Jewel's principal labor negotiator (R. 342). On August 29, a meeting was held at his offices attended by him and representatives of Kroger, A & P, National Tea, and Hillman (R. 355-356). Six employer needs were formulated at that meeting to be sought in negotiations: (a) night openings, (b) female wrappers, (c) wholly automatic wrapping machines, (d) a flexible work day, (e) the right to preprice off the premises, and (f) the right to sell fresh frozen meats (R. 356). These may be explained as follows:

(a) *Night openings:* The objective sought is removal or modification of the limitation upon market operating hours (R. 40x).

(b) *Female wrappers:* The objective sought is the creation of a new job classification to be filled by women whose work would be to package the meat after it had been cut and trimmed by the butchers. This is work presently performed by meat cutters. The wage to be paid to the female wrapper would be less than that of an apprentice meat cutter and the female wrapper would not progress to a higher classification. (R. 356-357.)

(c) *Wholly automatic wrapping machines:* The objective sought is authorization to use a machine that com-

pletes the wrap from beginning to end without the intervention of human hands (R. 357). This objective was attained in a later negotiation (R. 358).

(d) *Flexible work day:* This objective has its principal importance in relation to the extension of market operating hours to 9:00 p.m. The flexible work day would authorize the employer to schedule the meat cutter to begin to work his basic eight-hour day at any time during the morning hours of the day as late as noon. Thus, if the market were open from 9:00 a.m. to 9:00 p.m., the meat cutter could be scheduled to work from noon to 9:00 p.m., and unless premium pay were negotiated for work after 6:00 p.m. as such, he would receive the same wage as the employee scheduled to work from 9:00 a.m. to 6:00 p.m. (R. 358-361.)

(e) *Pre-pricing off the premises:* The pricing of meat products prepackaged by the packer is presently performed by the meat department employees. The objective sought is to have the packer's employees, rather than the meat department employees, price these products. (R. 360.)

(f) *Sale of frozen fresh meats:* The contract authorizes the sale of frozen fresh meat provided that the freezing is done by the meat department employees on the premises. The objective sought is to authorize the sale of frozen fresh meats prepared off the premises by the packer using his own freezing facilities and employees. (R. 360-361.)

3. On August 30, following the August 29 meeting at which the six employer needs were formulated, E. T. Vorbeck wrote Carl H. Bromann, secretary and treasurer of Associated (R. 366-367). Vorbeck expressed his opinion that "you will find the chains' interests substantially what they have been in the past. In other words, we will continue to press for the removal of all restrictions on our operations, which of course means night opening, the right to use female wrappers and fully automatic

wrapping machines, the flexible work day, the right to have products prepriced off the premises, and the right to sell frozen fresh meats." He expressed his "sincere hope that the independents which you and your affiliated associations represent can unite with the chains in endeavoring to secure most or all of these objectives." He concluded that he expected to see Bromann on the morning of September 5 "at which time all employers are scheduled to meet to determine the positions they will take at the afternoon's negotiations." (R. 41x.)

A "very able negotiator," Bromann is "acceptable" to the employer group as its chairman (R. 412). In the 1950's Bromann acted as chairman of the employer group for the entire period of the negotiations (R. 575-576).

4. A meeting of the employer group and the union group was held on September 5 (R. 362). The employers present were Jewel, National Tea, Hillman, High-Low, Kroger, A&P, Piggly Wiggly, Goldblatt, Wieboldt, Save-Way, Del Farm, Associated Food Retailers, Fair, Sure Save, and IGA (R. 362-363). Substantially the same group of employers continued to meet with the unions throughout the 1957 negotiations (R. 363). At a caucus of the employer group on that day Jewel expressed its willingness to reduce market operation on Saturday afternoon by three hours in exchange for a three-hour increase of market operation on Friday night (R. 369).

5. On September 9, High-Low telephoned Jewel to state that it was interested in one night of operation but no more (R. 369).

6. A meeting of the employer group and the union group was held on September 11 (R. 369).

(a) On that day Jewel was of the view that there were three courses of action open to it to secure night operation (*ibid.*). The first was to pay a wage differential, either in the form of a higher weekly wage rate or an

overtime premium, in any store open at night (R. 369-370). The thought was to pay more money to induce people to work at night (R. 370). The second course of action was to increase the total wage offer to the unions to the point that they could not refuse (R. 369-370). The thought was to offer a wage so high that the unions would endeavor "to sell" night operation to their members (R. 370). The third course of action was to litigate if negotiation of night operations was unsuccessful (R. 370, 371).

(b) At a caucus of the employer group on that day Goldblatt and Fair stated they were not interested in night openings, while Wieboldt expressed an interest in Friday night operation (R. 561). Although not expressed at that particular caucus, Kroger was not then or now too favorably inclined towards night operation, basing its position on the "cost factor" of how much it would "have to pay for the hours after 6:00 p.m." (R. 365-366). The cost of night operation includes the cost of paying butchers to work at night (R. 366). In the course of negotiations the cost of labor for night operation was an important consideration in the positions taken by the employers (*ibid.*).

(c) The employer group, except Associated, made a proposal to the union group which retained the present service and self-service contracts with the following changes (R. 371-372):

One, a term of two years.

Two, one night of operation per week on Friday night.

Three, flexible work day.

Four, a female wrapper classification.

Five, remove the restrictions on automatic wrapping equipment.

Six, wage increases for journeymen of $4 the first year and $3 the second, with appropriate smaller increases for apprentices.

Seven, right to have delicatessen items pre-priced off the premises.

Eight, right to sell all types of frozen fresh meat processed off the premises.

Nine, the right to supplement industry demands at any time.

Ten, to insert the following provision in the contract:

"This agreement shall be binding on the employer herein and its successors and assigns."

Eleven, the offer was made applicable to all Locals except 189, with the further clarification that those employers who have 189 contracts wish to discuss 189 as a separate issue.

Associated informed the employer group that it would present its proposal to the unions at a later meeting with R. Emmett Kelly and would report to the employer group the proposal it would make (R. 373). On September 13, pursuant to prearrangement, Associated informed Jewel in detail of the offer it had made to the unions the afternoon before (R. 372-373). At the ensuing meeting of the employer and union groups on September 15, Associated reported to the entire employer group the offer it had made (R. 373).

7. A meeting of the employer group and the union group took place on September 15, 1957 (R. 373). At that meeting the employer group, except Associated, made a proposal of which item 2 provided that market operating hours should be at the discretion of the employer subject only to the qualification that there shall be no market operation on Sundays or holidays (R. 373-374). R. Emmett Kelly told a subcommittee of employers that Friday night could be had for enough money (R. 374).

8. Meetings of the employer group and the union group were held on September 26 and October 2 and 16 (R. 374-375). At the time of the October 2 meeting Jewel was in the process of working up a proposal providing for market operating hours from 9:00 a.m. to 6:00 p.m., Monday through Thursday and on Saturday, 9:00 a.m. to 9:00 p.m. on Friday, and Sunday closed (*ibid.*).

9. A meeting of the employer group and the union group was held on October 22 (R. 375).

(a) At a caucus of the employer group on that day Jewel was informed that the employer group proposed to make an offer to the union group which retained the existing market operating hours provision unchanged (R. 375-376). At this point Jewel stood alone among the employer group in seeking a change (R. 376). Vorbeck for Jewel informed the employer group that if the limitation upon market operating hours was not lifted or modified acceptably to it Jewel would litigate the question (R. 376-377). He read to the group a letter from its legal counsel expressing the opinion that the limitation upon market operating hours, "insisted upon by Amalgamated Meat Cutters, Local No. 546, and Associated Food Retailers of Greater Chicago," violated the antitrust laws (R. 377, 379). Vorbeck had in part requested the preparation of this legal opinion in order to use it in negotiations (R. 377-378). Vorbeck also stated that on October 11 he had visited Bromann of Associated at his office to give him a copy of this legal opinion, to inform him that the question of marketing hours would be litigated by Jewel if not satisfactorily negotiated, and that Bromann and Associated would undoubtedly be named as co-defendants (R. 376-377, 378). Vorbeck told the employer group, at this caucus and at ensuing meetings, that any employer who opposed Jewel's position on marketing hours could be named as a co-conspirator in a suit (R. 379-380).

(b) At the meeting of the employer and union groups after the caucus, the employer group made its proposal to

the union group retaining the existing market operating hours provision unchanged (R. 375-376, 378). Vorbeck stated that Jewel was in basic agreement with the proposal except for its retention of the limitation on marketing hours (R. 379). He expresed his belief that this limitation was invalid and read the legal opinion he had received (*ibid.*). He stated that: "We would much prefer to negotiate for one or more nights of operation and would abide by the results of such negotiations if they were satisfactory to us. But if they were not, we felt impelled to litigate the matter even though our successful outcome of such litigation would inevitably mean that the market operations would automatically be opened to seven days a week, twenty-four hours per day, of operation" (R. 379, 572-573). As stated by R. Emmett Kelly to the members at the ensuing Local 546 contract ratification meeting, this was "negotiating with a gun in your back" (R. 120).

(c) Vorbeck then met separately with R. Emmett Kelly and other union representatives (R. 380). Kelly inquired what wage increase over and above the industry proposal Jewel had in mind to obtain agreement on night operation (R. 380). Vorbeck mentioned a wage increase which was "somewhat more" than the industry proposal but which was also contingent on obtaining agreement upon female wrappers (R. 381). In response to the question whether the same wage offer would be made if female wrappers were eliminated, Vorbeck stated that he doubted it very much and that the unions would find that many other employers would fall away from the industry proposal if female wrappers were eliminated (R. 382). In answer to the inquiry as to the premium for work at night that Jewel would be willing to pay, Vorbeck replied that it would be 25 cents per hour in conjunction with an entirely flexible work day (R. 382-383). This would mean that an employee scheduled to work from noon until 9:00 p.m. would receive 75 cents extra for the three hours of work after 6:00 p.m.

(R. 383). A guarantee of the number of employees who would work at night was also discussed (R. 382).

10. A meeting of the employer group and the union group was held on November 1 (R. 383).

(a) Prior to the meeting of the employer and union groups, Vorbeck met on November 1 with Kelly at the latter's office and made a proposal on behalf of Jewel alone (R. 383). Among the terms of the proposal were the following (R. 383-386, 44x):

1. Nights of operation—Five, Monday through Friday; journeymen on duty Thursday and Friday; first employee called on other nights must be a journeyman.

2. The workday to be changed to an eight (8) hour flexible workday to be worked between the hours of 8:00 a.m. to 9:00 p.m., Monday through Friday, and 8:00 a.m. to 6:00 p.m., on Saturday. No work on Sundays and holidays.

3. All requirements for payment of time and one half for work before 9:00 a.m. and after 6:00 p.m. to be eliminated and the following substituted: "Night work premium in the amount of 25¢ per hour shall be payable for all hours worked after 6:00 P.M. up to 6:00 A.M."

4. Female wrappers.

The wage scales proposed by Jewel were to apply to any market open for the sale of fresh meat after 6:00 p.m. (R. 384). Jewel had no objection were the unions to enter into a settlement with the rest of the industry at a lesser wage scale but without night operations (R. 385, 386). But Jewel was insistent that no more favorable terms be granted to any other employer for night operation unless the same terms were granted to Jewel (R. 385, 387-388).

(b) Subsequent to the meeting of the employer and union groups, Vorbeck again met separately with Kelly in order

to learn what would make Jewel's offer more acceptable to the unions (R. 389-390). Kelly stated that the proposals for female wrappers and a 25 cents per hour premium for night work were unlivable (R. 390, 655-656).

(c) Towards the close of the meeting of the employers and unions, Bromann of Associated informed Vorbeck that if all the employers could agree upon one night of operation he would endeavor to induce his group to go along with such a proposition (R. 390). Vorbeck stated that any offer that Associated might make for one night of operation would be given serious consideration (*ibid.*).

11. A meeting of the employer group and the union group was held on November 12 (R. 390).

(a) At a discussion among the employer group on that day, IGA suggested a comprehensive proposal, not presented to the union group, which included night operation on Thursday and Friday, 9:00 a.m. to 9:00 p.m., except that night opening would be on Tuesday if a holiday fell on Thursday; on all other days marketing hours would be 9:00 a.m. to 6:00 p.m., with no operations on Sundays and holidays (R. 390-391). IGA is an independent cooperative buying group which represented sixty stores in the negotiations; the meat departments in these stores were operated on a service basis in the main (R. 578-579).

(b) The proposal discussed on that day among the employers which was presented to the union group was prepared by National Tea (R. 391). Originally prepared on behalf of all industry except Jewel, the proposal was joined by Jewel after discussion among the employer group (R. 391, 47x, 171x). The proposal was ultimately made to the union group on behalf of all employers except Associated, Bromann for Associated stating that he would present the proposal to his group on November 14 and report Associated's position to the other employers on November 15

(R. 391-392, 579-580, 47x, 171x). Among the terms of the proposal were the following (R. 392-395, 579-581, 47x-48x, 171x-172x):

2. *Night operation:* Friday night meat department operation effective December 2, 1957. Male employee to be on duty during market operation.

4. *Female Wrappers:*

(b) *Duties:* Wrapping (including boarding and traying), sealing, scaling, pricing, labeling, displaying and slicing of luncheon meats.

6. *Work Day; Luncheon Period:*

(a) Effective December 2, 1957, the work day to be changed to an 8-hour day to be worked between the hours of:

1. 8:00 A.M. to 6:00 P.M. on Monday, Tuesday, Wednesday, Thursday, and Saturday.

2. 8:00 A.M. to 9:00 P.M. on Friday.

7. *Overtime or Premium Pay:* Effective December 2, 1957, all contract provisions requiring the payment of time and one-half after 6:00 P.M. and before 9:00 A.M. to be eliminated and the following provision substituted therefor:

(a) Night premium in the amount of 25¢ per hour shall be payable for all hours worked after 6:00 P.M. up to 6:00 A.M.

12. A meeting of the employer group and the union group was held on November 15 (R. 396).

(a) At this meeting the employer group, including Associated, presented a proposal to the union group (R. 396-398, 581, 51x, 174x). Associated joined all other employers in presenting this proposal (R. 396-397, 568, 582, 51x, 174x). Among the terms of the proposal were the following (R. 396-399, 581-584, 51x-52x, 174x-175x):

2. *Night Operation:* Friday night meat department operation, effective October 6, 1958. Male employee to be on duty during market operation.

4. *Female Wrappers:*

(b) *Duties:* Wrapping (including boarding and traying), sealing, scaling, pricing, labeling, and displaying, and slicing of luncheon meats.

6. *Work Day; Luncheon Period:*

(a) Effective December 2, 1957, the work day to be changed to an 8 hour work day to be worked between the hours of:

1. 8:00 A.M. to 6:00 P.M. on Monday through Saturday.

2. 8:00 A.M. to 9:00 P.M. on Friday, effective October 6, 1958.

7. *Overtime or Premium Pay:* Effective December 2, 1957, all contract provisions requiring the payment of time and one-half before 9:00 A.M. to be eliminated and the following provision substituted therefor:

(c) Effective October 6, 1958, night premium in the amount of 25¢ per hour shall be payable for all hours worked after 6:00 P.M. up to 6:00 A.M.

(b) Prior to the submission of this proposal a subcommittee meeting had been held on that day attended by a group of employers composed of Bromann for Associated and representatives of Sure Save, Del Farm, IGA, and Mayflower (R. 584, 412, 446, 579). They met with R. Emmett Kelly and other union representatives (R. 584). The employers stated that they had the permission of the entire employer group to talk with the union representatives about the operation of meat departments at night (R. 585). The employers sought to prevail upon the union represenatives to accept some type of night operation; they advanced their reasons to support this want (*ibid.*). Bromann asked the union representatives to agree to night operation (*ibid.*). The union representatives stated that they would take back the request to the full union negotiating committee and would give the employers a report later in the day (R. 585-586).

(c) Following this subcommittee meeting the employer group, including Associated, presented its proposal for night operation (R. 586). In response to this proposal, the union group outlined a counterproposal which made no provision for night operation, thus in effect rejecting the proposal of the employer group for Friday night operation (R. 399).

13. The final meeting of the employer group and the union group was held on November 20 (R. 400). Jewel, National Tea, Hillman, High-Low, and Piggly Wiggly continued to propose night operation on Friday night (*ibid.*). Kroger, A&P, Goldblatt, IGA, and Del Farm abstained from this proposal (R. 400-401). The union group rejected the Friday night operation proposal (R. 401). The union group presented a comprehensive proposal of its own which did not alter the existing provision pertaining to market operating hours and made no provision for female wrappers (R. 401-402, 53x.). After negotiation of minor variations in it R. Emmett Kelly on behalf of the union group polled the employers present to determine their position on the unions' proposal with the followings results (R. 402, 121-123):

Associated	yes
Del Farm	yes
National Tea	conditional yes
A&P	yes
Kroger	yes
IGA	yes
Goldblatt	yes
Hillman	yes
Sure Save	yes
Wieboldt	if Jewel only one opposed, yes; otherwise, no
Jewel	no

14. Vorbeck for Jewel met with R. Emmett Kelly for the union group at the latter's office on November 22

(R. 404). Vorbeck presented a comprehensive proposal on behalf of Jewel which included provision for one night of operation on Friday night and female wrappers (R. 404-405). Vorbeck requested that this proposal be submitted to a vote of the members at the contract ratification meetings (R. 404-405, 586, 56x-61x.). Kelly agreed to present it to the members (*ibid.*). Among the terms of the proposal were the following (R. 404-405, 59x-60x):

4. *Female Wrappers:*

   (b) Duties: Wrapping (including boarding and traying), sealing, scaling, pricing, labeling and displaying, and slicing of luncheon meats.

6. *Hours of Operation:*

   (a) All locals except Local 189: Friday to 9:00 p.m.

   (b) New Group 1 of Local 189: Friday to 9:00 p.m.

   (c) New Group 2 of Local 189: Six permissible to 9:00 p.m.

   (d) Groups 3, 3A and 4 of Local 189: No change in contract.

   (e) No operations on Sundays or holidays.

   (f) A male employee must be on duty at all hours that the market is open for the sale of meats.

   If the contract provision prescribing the hours of market operating is not relaxed so as to permit at least one night of operation to 9:00 p.m. in all areas, then the company intends to litigate the legality of this contract restriction. We shall do so with genuine regret.

8. *Workday:* Locals 262, 320, 546, 547, 571 and 638 and Group 1 in Local 189:

   (a) Monday, Tuesday, Wednesday, Thursday and Saturday: 9:00 a.m. to 6:00 p.m.

   (b) Friday: 9:00 a.m. to 6:00 p.m., with the employer to have the option to work male employees after 6:00 p.m. at time and one-half.

15. About 9:30 a.m. on November 23, R. Emmett Kelly received a telephone call from Vorbeck (R. 586). Vorbeck requested that, if the members rejected Jewel's proposal which included both night operations and female wrappers, the same proposal should be submitted to the members with the deletion of night operations but with the retention of female wrappers (R. 586-587). Vorbeck also asked Kelly to telephone him as to the outcome of the contract ratification meetings (R. 491).

16. At 10:30 a.m., November 23, representatives of National Tea met with R. Emmett Kelly at the office of the latter's attorney (R. 587). National Tea stated that it was joining Jewel in Jewel's proposal of November 22 which included provision for female wrappers and night operation (R. 588). National Tea did not join with Jewel in the latter's alternative proposal deleting night operation (*ibid.*). National Tea also stated it would join Jewel in legal action against the unions (*ibid.*).

17. The contract ratification meeting of Local 546 was held on November 24 (R. 588). Upwards of 3,000 members attended (*ibid.*). R. Emmett Kelly reviewed with the members the course of the negotiations in their entirety (R. 589). He read to them the legal opinion presented by Jewel which stated that the limitation upon market operating hours violated the antitrust laws (R. 119). He told the members that Jewel's course of action is what he "would call negotiating with a gun in your back" (R. 120). He informed the members that if they want a contract without night operation, "We will take our chances with court action, and if night operation comes to Chicago, we thank Jewel Tea for it" (*ibid.*). He explained to the members that there were three propositions that they were to vote upon: (a) the industry offer without female wrappers or night operation; (b) the Jewel-National Tea offer which included female wrappers and night operation; and (c) the alternate Jewel offer which

provided for female wrappers but omitted night operation (R. 124-125, 589). Kelly informed the members that the union negotiating committee recommended acceptance of the industry offer without night operation or female wrappers and rejection of the Jewel-National Tea offer and the alternative Jewel offer (R. 125).

The three proposals were put to a vote of the members and resulted in acceptance of the industry offer without night operation or female wrappers and rejection of the Jewel-National Tea offer and the alternative Jewel offer (R. 125, 589). At the conclusion of this stage of the meeting some of the members left (R. 590). Kelly informed the members that a secret strike ballot would now be conducted to secure authorization of a strike against Jewel and National Tea if a strike should be necessary, explaining to the members that he did not anticipate a strike but that it would strengthen the hand of the union negotiating committee to have strike authority (R. 125, 589-590). A secret strike ballot was conducted resulting in a vote of 2,253 in favor of a strike, 98 against, and 7 blank ballots (R. 126, 590).

Contract ratification meetings were held on the same day by the other unions except Local 189, the other meetings starting one-half hour after the commencement of the Local 546 meeting, with telephone communication being maintained between the other union meetings and the Local 546 meeting to apprise the others of the progress of the Local 546 meeting, as is customary (R. 590-591).

18. The representatives of the other unions on the afternoon of November 24 reported by telephone to R. Emmett Kelly the outcome of the votes at the contract ratification meetings held by them (R. 591). In accordance with Vorbeck's previous request, Kelly telephoned him on November 24 to apprise him of the outcome of the meetings (R. 591-592, 406-407, 129). Thereafter, Jewel by letter informed R. Emmett Kelly that Jewel had "decided to

sign under the duress of the strike vote of your membership" (R. 131, 407), and it entered into the agreements that the members had ratified and the other employers had accepted (R. 135, 28-58). About mid-week after the November 24 meeting, Cone of National Tea telephoned R. Emmett Kelly to state that National Tea had decided to accept the agreement to which all other employers had assented, and that, while it had been prepared to take a strike, it would not litigate (R. 594-595, 611-612).

B. The 1959 Negotiations

1. On June 4, 1959, the unions gave notice of their desire to negotiate new contract terms. The unions thereafter presented their contract demands to the employers. Meetings of the employer group and union group were held on July 21, August 18, 31, September 9, 25, November 2, December 1, 2, 3, 4, and 8. (R. 515-517, 80x-83x.)

2. On August 31, C. T. Van Ausdall, then of Piggly Wiggly, was appointed chairman of the employer group, and he remained in that position for the remainder of the 1959 negotiations (R. 517-518). As chairman, he stated the position of all the employers present at a meeting unless a particular employer disclaimed that position (R. 518).

3. Prior to the meeting on September 25, Vorbeck had prepared a list called "12 restrictions in the contracts and practices of Chicago Meat Cutter Locals" (R. 518-520, 83x). The first item enumerated in the list stated "Restrictions on the hours when a market may be open" (R. 518, 83x.). This list was distributed to the union group at the meeting of September 25 with the objective of securing union concessions on the subjects (R. 518-519). Each employer had in common the hope that the unions would lift at least some of the restrictions, with varying weight accorded by each employer as to which restrictions each wanted lifted (*ibid.*).

4. At the December 1 meeting R. Emmett Kelly stated that he was willing to discuss market operating hours and to bargain on the subject (R. 520). At the December 2 meeting the employer group, through its chairman, submitted a comprehensive proposal to the union group, including as item 9 the elimination of all restrictions upon market operating hours and providing for a completely flexible work day (R. 520). R. Emmett Kelly responded that he was willing to bargain on the subject of market operating hours (R. 520-521). At the December 3 meeting the employer group made another proposal to the union group of which item 11 called for the removal of all restrictions on market operating hours (R. 521). At the December 4 meeting the employer group presented a proposal to the union group and this proposal contained no request to remove the limitation upon market operating hours (*ibid.*). The 10-point response of the union group to this proposal contained a statement that the union group was willing to bargain on market operating hours (*ibid.*). Final agreement was reached at the meeting of December 8, retaining the existing provision pertaining to market operating hours, with Jewel expressing its reservation as to the validity of this limitation (R. 517, 135-136, 5x-16x.).

5. A contract ratification meeting was held among the members of Local 546 on December 14, 1959, attended by upwards of 3,000 members, at which the course of the negotiations was reviewed in detail with the members, and the members voted to ratify the agreement that had been reached (R. 595, 596). Other contract ratification meetings were conducted by the other local unions at this time (R. 595).

6. In contrast with the 1957 agreements providing that the workday shall begin at 9:00 a.m. and stop at 6:00 p.m. but authorizing the performance of work at overtime rates from 8:00 a.m. to 9:00 a.m., the 1959 agreements provided

that eight hours shall constitute the basic workday to begin no earlier than 8:00 a.m. and to end no later than 6:00 p.m. with no provision for overtime rates for work between 8:00 a.m. and 9:00 a.m. (R. 522, 35, 36, 49, 50, 7x, 13x, 14x, art. 4, §§ 1, 4). The consequence of the change was that, while work under both the 1957 and 1959 agreements was permissible between 8:00 a.m. and 9:00 a.m., the 1959 agreements eliminated the requirement of payment at time and one-half for that early morning work (R. 523). This was a union concession which granted the employer group a limited flexible work day (*ibid.*).

C. The 1961 Negotiations

1. On July 27, 1961, the union group presented its contract demands to the employer group (R. 523-524, 85x.). A meeting of the employer group and the union group was held on August 22 (R. 524). The preceding day, August 21, a meeting of the employers alone took place (*ibid.*). E. T. Vorbeck of Jewel was selected permanent chairman of the employer group to act for the duration of the 1961 negotiations (*ibid.*). As chairman, he stated the position of all the employers present at a meeting unless a particular employer disclaimed that position (R. 525). A steering committee, composed of six members and six alternates, was selected to guide and assist the chairman (R. 524-525). Bromann of Associated was a member of the steering committee (R. 525). In accordance with the request of the employer group, Vorbeck worked up a revised list of what the employers regarded as undesirable contractual restrictions which again contained objection to the limitation upon market operating hours (R. 525-526).

2. A meeting of the employer group and the union group was held on September 12 (R. 526). The employer group submitted a contract proposal to the union group (R. 527, 528-529, 90x.). This proposal had been drafted by Vorbeck; members of the steering committee had

discussed, revised, and put the draft into a form satisfactory to the employer group for presentation to the union group; and Bromann of Associated concurred in the submission of the proposal to the union group (R. 526-529). The proposal contained no limitation upon market operating hours and thus committed this subject to the discretion of the employer (R. 529). The proposal did not provide that work after 6:00 p.m. would as such be compensated at a premium rate (R. 98x-99x.) Among the provisions pertinent to work after 6:00 p.m. were the following (R. 97x-99x.):

> *Section 4.1 Workday and Workweek*
>
> Eight (8) hours exclusive of meal periods shall constitute the basic workday.
>
> * * *
>
> *Section 4.2 Meal and Rest Periods*
>
> * * * Each employee who is scheduled to work after 6:00 P.M. shall also be allowed one-half hour off for supper. . . .
>
> No lunch period shall begin earlier than 11:00 A.M. nor end later than 2:00 P.M. and no supper period shall begin earlier than 5:00 P.M. nor end later than 8:00 P.M. * * *
>
> *Section 4.3 Work Hours; No Split Shifts*
>
> The hours and days to be worked by each employee shall be determined by the Employer except that no employee shall work a "split" shift, that is, any workday the continuity of which is broken by a period longer than a meal period.
>
> * * *
>
> *Section 4.6 Overtime and Other Premium Pay*
>
> All employees may be required to work overtime.
>
> *Time and one-half* the employee's regular hourly rate of pay shall be paid for all work:
>
> (a) In excess of 8 hours in any one day.
>
> (b) Effective September 3, 1963 after 44 hours in any week.

(c) On Sundays, and

(d) On Holidays.

Premium pay in the amount of twenty-five (25¢) per hour shall be paid in addition to the regular hourly rate for all work on the fifth day of a holiday workweek and on the sixth day of a regular workweek, except that this premium shall not be applicable to any work for which the employee is entitled to receive time and one-half.

In response to this proposal R. Emmett Kelly stated that he was not closing the door to negotiations on market operating hours (R. 529).

3. Meetings of the employer group and the union group were held on September 20, 28, 29 and October 4, 13 (R. 529-530). At the meeting of September 29, R. Emmett Kelly asked the employer group to make a breakdown of its contract demands (R. 596). The request was made after a series of meetings in which no progress was achieved and for this reason the union group asked the employer group "to give us something definite to work from. We wanted to know what type of night operation they wanted; we wanted to know what about female help; we wanted to know about ratios for female help; we wanted to know the price they would pay for night operation; we wanted to know about health and welfare, and various other things" (R. 596).

4. On October 17, Vorbeck reported to his superior (R. 341-342) on the status of the negotiations and stated on the subject of market operating hours that (R. 530-532):

> The sub-division in the industry likewise shows up with respect to night operations. Here we are not encountering any opposition from the Associated Food Retailers whose representative has officially, possibly for the purpose of litigation, stated that his membership were interested in three nights of operation, Mondays, Thursdays, and Fridays. On the other

hand, the other major chains seem opposed to any discussion of the basis on which night operations can be had, although they joined with Kelly in stating their willingness to discuss night operations. For example, when I submitted a journeyman on duty contract provision, similar to that which we have in Local 350, Gary-Hammond, which has produced a lower wage cost for us than a more onerous requirement in our Joliet contract, the industry refused to permit me to offer it as an industry proposal.

* * *

The principal demands which employers are seeking are: . . . Four, complete removal from the contract of all restrictions on market operating hours.

5. A meeting of the employer group and the union group was held on November 1 (R. 530, 532). At a caucus of the employer group on that day the employers sought to find a common ground among themselves on the subjects of health and welfare and market operating hours (R. 532). The employers then and throughout the negotiations were divided on their approach to health and welfare (*ibid.*).

6. A meeting of the employer group and the union group was held on November 2 (R. 534). On behalf of the employer group, Vorbeck propounded a hypothetical question to the union group on market operating hours (R. 535). He put "the following three assumptions: (1) That all provisions of the contract, namely, wages, health and welfare, vacations, et cetera, had been settled; (2) That the industry reached agreement to limit the sale of fresh meat to three nights a week, Monday, Thursday and Friday; . . . and that (3) Jewel offers to drop its suit without prejudice and agrees not to reinstitute it during the term of the contract if the industry offer of night operations is accepted" (*ibid.*). Based on these three assumptions, Vorbeck "asked under what conditions will the union be willing to recommend that the hours when fresh meat may be sold be extended to Mondays, Thursdays and Fridays to 9:00 P.M." (*ibid.*).

The union group recessed for thirty-five minutes and R. Emmett Kelly then responded to the hypothetical question: "One, the assumptions are loaded; two, to negotiate night hours on the limited basis of three nights a week is unrealistic and would be conspiring with a group of employers to limit operations to certain nights and certain hours; three, the union is willing to negotiate for seven days each week and twenty-four hours per day operation; and, if all employers as a group present such a demand, the union would react with a demand covering such requests; four, the above premised on the assumptions tendered by the employers" (R. 535-536, 556, Stipulation to correct record, Jan. 22, 29, 1963).

The union group then left the meeting and a discussion among the employer group took place (R. 536). The employer group decided to send a subcommittee of two representatives to explore the matter further in a meeting with a subcommittee of the union group composed of R. Emmett Kelly and two others (*ibid.*). After the subcommittee meeting the employer representatives reported to the employer group that the union response was: (1) the unions were not favorable to night operations under any circumstances; (2) the demand for night operation will have to come from the entire industry and must provide for seven days and nights of operation; and (3), "if such a demand is received, the price will be stiff" (R. 537).

The objective of the employer group in propounding the hypothetical question was to try to ascertain what set of conditions the industry would have to meet to formulate an offer which would be acceptable to the union group, *viz.*, the unions' position on such matters as the number of journeymen on duty, the number of nights they would be expected to work, and whether their scheduled starting time for work after 6:00 p.m. would be at 9:00 a.m. or at noon (R. 554). According to Vorbeck, based on

R. Emmett Kelly's reply to the hypothetical question, the "unexpressed consensus" of the employer group "was that he had slammed the door, that he had made it impossible to negotiate further" (R. 556).

7. A meeting of the employer group and the union group was held on November 3, 1961 (R. 537). The employer group made a proposal to the union group which made no change in the existing provision pertaining to market operating hours (R. 537, 555). At this time the employer group regarded it as "rather hopeless" to obtain union agreement upon a modification (R. 555).

8. A meeting of the employer group and the union group was held on November 13 (R. 537). At a meeting of the employer group alone on that day Vorbeck informed the employer group that Jewel planned to make a proposal on behalf of itself on the subject of market operating hours (R. 537-538). Vorbeck distributed the proposal, which was in the form of a letter to R. Emmett Kelly dated November 13, 1961, to the employer group (R. 538). Vorbeck told the employer group that any employer was free to join in the proposal; no employer joined Jewel (R. 538, 553-554). The proposal was not submitted on that day by Vorbeck to the union group because the meeting "was a rather stormy session"; it did not "seem timely to present it to the union" because "We were having enough trouble on another major issue, which was health and welfare"; Vorbeck "wanted the union in a more receptive mood of mind" before submitting the proposal (R. 537-539). The proposal which Vorbeck distributed to the employer group but refrained from submitting to the union group provided that (R. 19x-21x):

> *Jewel Offer No. 1—Self-Service Markets Only*
>
> During these negotiations, and also the negotiations for the last several years, you have consistently maintained that neither our meat cutters, nor those of any other employer want to work after 6:00 P.M.

Our first offer is designed to accede to the stated wishes of your membership in this respect in that no employees will be required to work on Sundays or after 6:00 P.M., Mondays through Saturdays, inclusive. Since it is not possible to operate a service market without employees on duty, this limitation on the hours which employees may be required to work necessarily limits our offer to self-service markets.

Jewel offers to enter into a contract covering its self-service markets which will provide the same wages, health and welfare, vacations and all other terms of employment as those agreed upon between the Affiliated Locals and the industry, except as follows:

1. All restrictions on the hours at which meats and meat products may be sold shall be removed from the contract.

2. No employees other than the members of the Meat Cutters Union may stock or rotate the meats in self-service cases.

3. No employee may be required to work on Sundays or after 6:00 P.M., Mondays through Saturdays, inclusive, except that reasonable overtime may be required outside of such hours if the market or meat department is not open for the sale of meat.

Jewel Offer No. 2—Self-Service and Service Markets

In the belief that adequate remuneration for work after 6:00 P.M. may offset the desire of your membership not to work after 6:00 P.M., Jewel offers to enter into a contract applicable to both service and self-service markets which will provide the same wages, health and welfare, vacations and other contract provisions as those agreed upon between the industry and the Union's negotiating committee, except as follows:

1. All restrictions on the hours at which meats and meat products may be sold shall be removed from the contract.

2. No employees other than the members of the Meat Cutters Union may stock or rotate the meats in self-service cases.

3. All work in excess of 8 hours in any one day, or after 6:00 P.M. on Mondays through Saturdays, inclusive, or on Sundays, shall be paid for at time and one-half.

4. A journeyman must be on duty during all hours that fresh meat is offered for sale between the hours of 9:00 A.M. and 9:00 P.M. on Mondays, Thursdays and Fridays, and between the hours of 9:00 A.M. and 6:00 P.M. on Tuesdays, Wednesdays and Saturdays. If the needs of our business require that an employee be on duty after 6:00 P.M. on Tuesdays, Wednesdays or Saturdays, or at any time on Sundays, the first employee called to work during such hours must be a Journeyman Meat Cutter. If a journeyman is on duty, additional employees on duty at the same time may be apprentices or male meat clerks.

   We shall, of course, endeavor to rotate any work required after 6:00 P.M. and on Sundays among qualified journeymen.

5. The workday for any employee scheduled to work after 6:00 P.M. shall be so fixed as not to require him to put in more than 8 hours on the job. Thus, an employee who would be expected to work to 9:00 P.M. with one hour off for supper would be scheduled to start work beginning at 12:00 noon.

   An earlier starting time for an employee required to work at nights might be agreed upon, but we have not offered it in the belief that you would not want to require by union contract a longer workday than 8 hours.

9. A meeting of the employer group and the union group was held on November 16 (R. 539). Jewel excepted, agreement was reached by the employer and union groups (R. 539-542, 109x.). Jewel's exception from the agreement was limited to (a) health and welfare, and (b) market operating hours (*ibid.*).

(a) *Health and welfare:* The agreement reached was that, based on the choice expressed by majority vote of the

employees of each employer, the employees of that employer would participate in either a union-employer jointly administered health and welfare trust fund or would participate in an individual employer plan, but that participation in either the jointly administered fund or the individual employer plan would be cost-free to the employees (R. 540-541, 111x-112x.). Jewel declined to agree that participation in its individual plan should be cost-free to its employees (R. 540-541, 113x-114x.).

(b) *Market operating hours:* Between November 13 and 16 no employer informed Jewel that it would join the latter in its proposal on market operating hours (R. 539). On November 16, "at the conclusion of a very long, harassing day," at the time that the meeting of the employer and union groups was "breaking up," Vorbeck presented to R. Emmett Kelly the proposal on market operating hours which Jewel had distributed to the employers on November 13 (R. 542). Vorbeck asked Kelly to submit this proposal to the members at the contract ratification meeting preferably with a favorable recommendation but even without recommendation (*ibid.*).

10. A contract ratification meeting was held among members of Local 546 on November 26 attended by upwards of 3,000 members (R. 596). The course of the 1961 negotiations was reviewed with the members (*ibid.*) Jewel's offer No. 1 and offer No. 2 on market operating hours was read verbatim to the members (R. 597-598). Jewel's offer No. 1 was put to a vote of the members and was rejected by them (R. 598). Jewel's offer No. 2 was put to a vote of the members and was likewise rejected by them (*ibid.*). The proposal to which the employer group, Jewel excepted, had assented was put to a vote of the members and was accepted by them (*ibid.*). Contract ratification meetings were conducted by the other local unions on the

same day with the same customary communication being maintained between their meetings and that of Local 546 (*ibid.*). Jewel knew on November 27 that the members had rejected both proposals submitted by it pertaining to night operations (R. 543).

11. On January 2, 1962, Vorbeck informed R. Emmett Kelly that Jewel accepted the settlement which had been reached between the employer group and the union group, including the accord on health and welfare and market operating hours, but expressing reservation as to the validity of the market operating hours provision (R. 543-544, 135-136, 17x, 18x).

VIII. BASIS OF THE UNIONS' OPPOSITION TO NIGHT OPERATION OF MEAT DEPARTMENTS AND CERTAIN FACTS PERTAINING TO IT.

We now set forth the reasons why the unions oppose night operation of meat departments and certain of the underpinning facts which are the basis for that stand.

1. *The scope of Jewel's night and Sunday operation of its grocery departments; its aim to operate the meat departments the same hours; and its night and Sunday operation of meat departments outside the Chicago area:* Jewel states that, in seeking to remove the limitation upon market operating hours in the Chicago area, its purpose is to operate the meat department in its stores during the same hours as it operates the grocery department in its stores. (R. 348). At the close of 1957 and 1961, within the Chicago area, except for five stores in 1957 and two stores in 1961, Jewel in all other stores operated the grocery department after 6:00 p.m. one or more nights per week (R. 344-348, def. exs. 9, 10). Most grocery departments operated to 9:00 p.m., five nights per week, Monday through Friday; some operated six nights per week to 9:00 p.m.; one operated six nights per week to

10:00 p.m.; and the plain trend was toward greater night operation.[6]

In addition, at the close of 1961, Jewel operated the grocery departments of fifteen of its stores within the Chicago area on Sunday (R. 515, def. exs. 9, 10).

Finally, in 1962, of the 33 stores operated by the Jewel Food Store Division outside the Chicago area, within which no limitation upon market operating hours exists, in all stores but one the meat department operated after 6:00 p.m. one or more nights per week, with two stores operating the meat department to 11:00 p.m., eight stores operating the meat department six nights per week to

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[6] The operating hours *after* 6:00 p.m. of the grocery departments in Jewel's stores within the Chicago area at the close of 1957 and 1961 were as follows (R. 344-348, def. exs. 9, 10, pl. ex. 13 n, o):

	As of 12/28/57 Number of Stores	As of 12/30/61 Number of Stores
9:00 a.m. to 9:00 p.m., Mon. thru Fri.	65	131
9:00 a.m. to 9:00 p.m., Fri.	71	41
9:00 a.m. to 9:00 p.m., Thurs., Fri.	32	26
9:00 a.m. to 9:00 p.m., Mon., Thurs., Fri.	3	2
9:00 a.m. to 9:00 p.m., Mon., Thurs.	1	—
9:00 a.m. to 9:00 p.m., Thurs.	1	1
9:00 a.m. to 9:00 p.m., Fri. 9:00 a.m. to 7:00 p.m., Mon. thru Thurs.	—	2
9:00 a.m. to 9:00 p.m., Thurs., Fri. 9:00 a.m. to 7:00 p.m., Mon., Tues., Wed.	—	1
9:00 a.m. to 9:00 p.m., Mon. thru Sat.	—	3
9:00 a.m. to 10:00 p.m., Mon. thru Sat.	1	1
9:00 a.m. to 7:00 p.m., Fri.	2	—
9:00 a.m. to 8:30 p.m., Fri. 9:00 a.m. to 6:30 p.m., Thurs. 9:30 a.m. to 6:30 p.m., Mon., Tues., Wed.	—	1

9:00 p.m., Monday through Saturday, and seven stores operating the meat department on Sundays.[7]

2. *The Chicago area butchers' traditional opposition to night work:* The unions oppose night operation of meat departments because the employees they represent do not wish to work at night "but prefer being home with their families" (R. 601). As expressed by R. Emmett Kelly in a 1957 letter to the members, with night operations comes "absence from your homes and families . . ." (R. 131). Jewel itself recognized in a 1961 letter to R. Emmett Kelly that "During these negotiations, and also the negotiations for the last several years, you have consistently maintained that neither our [Jewel's] meat cutters, nor those of any other employer want to work after 6:00 P.M." (R. 19x).

This opposition to night work and operations is historical with the Chicago area meat cutters; "This was the tradition of the organization, that they did not want to work at night" (R. 601). As a boy "in the tail-end of . . .

[7] The market operating hours of the meat departments in these 33 stores was as follows (pl. ex. 13 n, o):

	Number of Stores
9:00 a.m. to 9:00 p.m., Fri.	3
9:00 a.m. to 9:00 p.m., Mon. thru Fri.	11
9:00 a.m. to 9:00 p.m., Thurs., Fri.	5
9:00 a.m. to 9:00 p.m., Mon. thru Sat.	5
8:00 a.m. to 9:00 p.m., Mon., Tues., Wed., Sat. 8:00 a.m. to 11:00 p.m., Thurs., Fri.	1
9:00 a.m. to 9:00 p.m., Mon. thru Fri. 9:00 a.m. to 2:00 p.m., Sun.	1
9:00 a.m. to 9:00 p.m., Mon. thru Fri. 9:00 a.m. to 6:00 p.m., Sunday	2
9:00 a.m. to 9:00 p.m., Mon. thru Sat. 10:00 a.m. to 6:00 p.m., Sun.	3
9:00 a.m. to 11:00 p.m., Mon. thru Fri. 9:00 a.m. to 9:00 p.m., Sat. 10:00 a.m. to 6:00 p.m., Sun.	1
9:00 a.m. to 6:00 p.m., Mon. thru Sat.	1

the gaslight era," accompanying his father and other union officials, R. Emmett Kelly "went around to the markets . . . to help close them down . . . on Sundays and at nights after 6 o'clock . . ." (R. 104-105, 3x). In a 1954 letter to the members, R. Emmett Kelly stated that "when you voted for 'no night operation' you were voting for your home life and the American right to share your time with your families"; "we've done it *alone* in the past" and "With your solid support and cooperation Chicago and Suburbs will always close every night of the week at the *Union* closing hour of 6 P.M." (R. 3x, emphasis supplied).

This remains the attitude of the unions (R. 108-109). In 1955 the unions had removed a local union from the union bargaining group because that local union "permitted female help and Friday night operations" within its territory which the unions "'have been fighting against all these years'" (R. 112-113). The opposition of the meat cutters to night work and operations has been expressed by them many times at membership meetings, contract ratification meetings, and other meetings (R. 601). A meeting was held in July 1962 of over 1100 meat cutters employed by Jewel, conducted to determine whether they desired to participate in the jointly administered health and welfare fund or Jewel's individual plan and at which they voted to remain with the individual plan; taking advantage of the opportunity presented by "having that many meat cutters from Jewel under one roof", the employees were given a "run-down" of the "present status" of the litigation "in regard to night operation"; in a voice vote on the question whether "they wanted night work or didn't want night work," Jewel's employees voted "a unanimous no, that they did not want night work" (R. 601-603). In a mail ballot conducted among all of Jewel's meat cutters in October, 1962, at which they were asked to signify whether they were "opposed to working nights" or "in favor of working nights," Jewel's meat cutters voted 759 to 28 against working nights (R. 144-145, 22x, Tr. 147).

3. Basis of opposition to self-service meat department operation without employees: The unions oppose any proposal to operate a self-service meat department after 6:00 p.m. without employees on duty (R. 603). This opposition is based upon the following grounds:

(a) It cannot be done. It is necessary to have "people on duty" in order to operate a self-service meat department after 6:00 p.m. (R. 603). Personnel is required in order that the stock in the counter that is disarranged in the course of normal sale be kept in orderly shape; to restock and replenish merchandise; to clean the cases; and to perform the custom cutting that is required (*ibid.*). The sale of certain delicatessen items after 6:00 p.m. from self-service cases is authorized by contract upon the condition that these items be stocked in the cases by meat department employees before 6:00 p.m. and not be stocked or handled in the cases by any employees after that hour; experience in the sale of these items after 6:00 p.m. shows that "practically" always "at some time during the course of the evening hours that . . . [the] market is open . . . somebody from the grocery department, the grocery clerk, the assistant manager, the manager himself, is rearranging and restocking the cases" (R. 603-604, 18x (§ 2.3), 17x (§ 2.2)). Jewel operates a store located outside the Chicago area at Calumet Avenue in Hammond, Indiana; the self-service meat department in that store is ostensibly operated without employees on duty after 6:00 p.m. on Monday, Tuesday, and Wednesday (R. 289); yet, on Tuesday, November 7, 1962, at 8:40 p.m., two part-time grocery clerks were in the wrapping room of the meat department and one of the two, at the request of an apparent customer who stated that he wanted a two-pound rump roast, removed two rump roasts from a holding cooler in the wrapping room and brought it to the customer to make a selection (R. 494-495).

(b) To operate a self-service meat department after 6:00 p.m. without employees would add to the work load of the meat department employees by (*i*) the increased work entailed in putting the counters into proper shape

each morning after they have been disarranged the night before, and (ii) the increased work required on Friday before 6:00 p.m. in order to cut and prepare the meats to be sold after 6:00 p.m. (R. 604).

(c) Service and self-service meat markets compete with each other. Night operation of self-service meat departments without employees on duty would necessitate night operation of service meat departments. A service meat department can only operate with employees on duty. Furthermore, were the self-service meat department to operate at night and the service meat department to remain closed, there would be a loss of work and employment by meat cutters employed in the service meat departments. (R. 604-605.)

4. *Expert confirmation of the unions' view that the operation of a self-service meat department after 6:00 p.m. requires employees on duty:* Expert opinion holds the view that fresh beef, veal, lamb, mutton, and pork cannot be satisfactorily sold in a self-service meat department between the hours of 6:00 p.m. and 9:00 p.m. without employees on duty in the department (R. 415-416, 448-449). This opinion rests on the following bases: (a) In handling packages customers put back those they decide not to buy in the wrong parts of the counter and also tear the cellophane of the package rendering it unsalable unless rewrapped; as a result, unless employees are on duty, the self-service counters in the meat department become disheveled, disarranged, and untidy. (b) Without employees on duty the self-service cases are not stocked with an adequate variety of meat because of insufficient initial stocking and lack of replenishment as stocks are depleted by sale; the desired cut may be in the cooler but not in the counter, and there is no one to bring it to the customer or to provide custom cutting for the customer. (c) There is no one to assist the customer in selecting meat, in advising her as to its preparation, and in explaining weight and price information on the packages. (R. 449-453, 416, 419-421.)

One expert has observed night operation of meat departments "across the country all the way from California to Florida" and he has found that "night operations without employees on duty has been unsatisfactory" (R. 449);[8] operation without employees on duty is confined to the dull business nights of Monday, Tuesday and Wednesday (R. 451, 450); there is always at least a skeleton crew of employees on duty on Thursday and Friday and operations with a skeleton crew only is likewise unsatisfactory (R. 451-452).[9]

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[8] In the printed record the quoted word "night" appears as "my." The stipulated correction from "my" to "night" appears at Tr. 1075-76.

[9] The opinion in this paragraph was expressed by Theodore J. Meindl, and in the preceding paragraph by Meindl and George P. Kokalis. Beginning in 1947 until sold by him in November 1961 to National Tea, Kokalis operated a chain of food stores in Chicago known as Sure Save Food Marts which, at the time of sale, consisted of eleven stores in which ten of the meat departments were operated on a self-service basis and one on a service basis (R. 412-414). Beginning in 1945 or 1946 until sold by him in 1958 to National Tea, Meindl operated a chain of food stores in Chicago known as Del Farm Stores which in 1957 consisted of twelve stores in which eleven of the meat departments were operated on a self-service basis and one on a service basis (R. 446-447). Kokalis and Meindl both favored night operation of meat departments during the time that they ran their chains in Chicago (R. 415, 421-422, 465, 584-585, 365); as described by Jewel, Meindl "would operate at any hours he could" (R. 365), and Kokalis' position on night operations "was very much like" Jewel's (R. 365). Before he began to operate Sure Save, Kokalis had been general manager of Grocerland Cooperative, a buying organization for a group of 155 independent food stores, and had operated a number of individual food stores containing meat departments (R. 414-415, 416-418). Before he began to operate Del Farm, Meindl was an A&P superintendent overseeing A&P's meat operations in 300 stores in Chicago and suburbs (R. 447-448); after he sold Del Farm, Meindl was engaged by different food store chains as a consultant and operator, including a current assignment for National Tea to advise upon improvement of store operations in a recently acquired chain of 115 stores in Pittsburgh and Youngstown (R. 453-457, 459-462, 464-465).

5. *Jewel's own policy, practice, and experience confirm expert opinion:* In the operation of its self-service meat departments Jewel states as "a must" that there be "a man on the counter at all times . . ." (R. 486); Jewel requires a butcher at the counter "to create . . . a friendly and courteous atmosphere between the meat cutters and the customer"; "to keep the counter straight, perform any services which the customer might request and fill special requests that the customer might want that she can't find in the counter" (R. 487-488). To keep Jewel's counters straight, the meat cutter at the counter removes bloody packages and torn packages and returns them to the back room of the meat department for rewrapping; he removes meat which is on the verge of spoiling or has spoiled and returns it to the back room for reprocessing if still salable or for throwing out if not; he removes slow-moving items and returns them to the back room to be recut into different items to stimulate their movement; on observing a customer selecting a piece of meat that is not salable but has not yet been removed from the counter, he dissuades her from taking it and explains that he will obtain a fresher cut for her; and he replenishes stock that has become depleted through sale (R. 488-489, 490-491, 507). In addition to the daytime hours, these services are performed between 6:00 p.m. and 9:00 p.m. when the meat department is open during these hours and a meat cutter is on duty (R. 490). To assure the continuous presence of a meat cutter at the counter Jewel installs a telephone at the counter enabling the meat cutter to communicate instructions to the back room without leaving the counter (R. 489-490, 507). Customer practices in the handling of meat observed in Jewel's stores, which prevail as well between the hours of 6:00 p.m. and 9:00 p.m. (R. 492), include replacing packages in the wrong part of the counter (sometimes to the extent of actually throwing packages from one section of the counter to another and leaving them on the grocery shelf), children running up and down

the counter poking holes in the packages containing soft meats, and customers deliberately tearing the package open to inspect the meat on the other side (R. 490-492).

6. *In Jewel's and A&P's operation of self-service meat departments at night outside the Chicago area butchers are on duty:* Outside the Chicago area, where no limitation upon market operating hours exists, the following situation prevails with respect to the employment of meat cutters at night in meat departments operated at night: In Jewel's three stores in Rockford, Illinois, the self-service meat department is operated five nights until 9:00 p.m., Monday through Friday (pl. ex. 13-0); at two of the stores, one or more butchers are employed at night on Monday, Tuesday, and Wednesday, and two or more on Thursday and Friday; at the third store, one butcher is employed at night on Monday, Tuesday, and Wednesday, and two on Thursday and Friday (R. 478-481). In two A&P stores in Rockford, the meat department is operated five nights until 9:00 p.m., Monday through Friday; in one store usually one meat cutter (sometimes two) is employed at night on Monday, Tuesday and Wednesday, one or more on Thursday, and two (sometimes four) on Friday (R. 482-485); in the second store one butcher is on duty each of the five nights (R. 482). At the A&P store in Freeport, Illinois, in which the meat department is operated five nights until 9:00 p.m., Monday through Friday, one meat cutter is employed at night on Monday, Tuesday and Wednesday, three or four on Thursday, and five on Friday (R. 484).

In Jewel's Food City store at Highland, Indiana, where the meat department is open six nights a week, a butcher is on duty on Friday and Saturday nights at the fresh meat counter, and, in addition, another butcher is on duty each night of the week in the sausage shop of the meat department (R. 242-243, 244-245); in Jewel's 7420 store at Hammond, Indiana, where the meat depart-

ment is open six nights a week, one butcher is on duty on Thursday night and one (sometimes two) on Friday night (R. 290-291, 289); in Jewel's 4501 store at Gary, Indiana, where the meat department is open six nights a week, a butcher is on duty Thursday and Friday nights (R. 293, 294). Except in the Gary-Hammond area (Lake County, Indiana), by union contract a butcher is required to be on duty whenever the meat department is operated at night (R. 547). In the Gary-Hammond area, butchers are on duty at least two nights a week, and butchers may be on duty additional nights a week as required by the volume of business (R. 547-548). The result is that, with only few exceptions, meat cutters are on duty whenever a meat department is open after 6:00 p.m. (*ibid.*). Only when business is light is a meat department open after 6:00 p.m. without a meat cutter on duty (R. 548; see also, R. 492, 493-494, 644-645).

7. *With a single belated exception every proposal to operate a self-service meat department at night called for employees on duty:* Excepting Jewel's offer dated November 13, 1961 (*supra*, p. 41), neither Jewel nor any other employer ever proposed that a self-service meat department be operated after 6:00 p.m. without employees on duty (R. 605). And, again excepting Jewel's offer dated November 13, 1961, every proposal made in the 1957, 1959 and 1961 negotiations for the operation of a meat department after 6:00 p.m. pertained to both service and self-service markets (R. 548-549). In general all food stores within a competitive area operate the same number of hours (R. 546).

8. *The relation of night operation to wages:* In the 1957, 1959, and 1961 negotiations, R. Emmett Kelly stated that market operating hours was a negotiable issue (R. 605). As he explained, given a proper proposal for night operation, "there would be some possibility of having it" (*ibid.*). Were the employers to offer a

sufficiently high premium payment for night work, "certainly people have a way of changing their minds" (R. 616). However, an offer for time and one-half for work after 6:00 p.m., when coupled with the flexible work day, represents a half-time premium (R. 617). As Jewel recognized in its offer dated November 13, 1961, "half-time premium pay" is "involved in paying time and one-half for work after 6:00 P.M. . . ." (R. 21x). Jewel understood this as early as August 30, 1957, for in explaining to Bromann of Associated the import of certain contracts with local unions other than the petitioner unions, Jewel stated that: "Both contracts require us to pay time and one-half after 6:00 p.m., but since we are enabled to start the workday as late as 12:00 noon, this means that we can incorporate such overtime as part of the basic workweek, if we so desire. This also means that our expense for such overtime is increased merely by the half-time extra rather than time and a half" (R. 40x). R. Emmett Kelly thinks that "true time and a half" would be a "fair premium" but he does not "know whether . . . [he] can convince the membership we represent on that" (R. 617). Thus far no money offer made by the employer group has been sufficiently high to persuade the members to work at night.[10]

9. *Not conspiracy but unilateral self-interest:* At no time has any union representative had any agreement or understanding with any employer to insist on maintaining opposition to night marketing hours (R. 606). The union representatives base their position on night operating hours exclusively upon what they regard to be the best self-interest of the members (*ibid.*).

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[10] "Well, it is difficult for me to say how much more money, because frankly, there has never been the kind of offer made from the employer group that would be awfully strong for these people to make a decision in that regard" (Tr. 1282).

IX. THE DECISION OF THE DISTRICT COURT.

In summarized form the facts set forth in the Statement are encased in the District Court's findings (R. 661-678). Based on them, the District Court found that "Lifting the restriction on marketing hours would mean a return to longer hours and night work. This is evident from the face of the employer proposals, which included the 'flexible day,' night hours, and wage premiums 'to sell' night work, and from the practices of the trade, particularly in plaintiff's stores where night sales of fresh meat were authorized" (R. 672).

The District Court also addressed itself to the ostensible alternative that a self-service meat department could operate without any employees on duty after 6:00 p.m. The Court noted that "Only one proposal was ever made by . . . [Jewel] in the course of the prolonged negotiations on all three contracts, which suggested night operations without butchers on duty, and that was submitted to the unions at the end of the day as negotiations were 'breaking up' on November 16, 1961" (R. 667), the last day of negotiations (R. 539-542). The Court observed that the unions "questioned the seriousness of that proposal under the circumstances" (R. 667). Even taking it at face value, the Court found that it "was contrary to the Union's self-interest. It meant that their work would be done by others unskilled in the trade, since the evidence showed that in stores where meat is sold at night it is impractical to operate without either butchers or other employees. Someone must arrange, replenish and clean the counters and supply customer services. In addition, that proposal would involve an increase in workload in preparing for the night work and cleaning the next morning" (R. 672).

The District Court therefore stated as its ultimate conclusion that (R. 672-673):

> Thus, the union's insistence on the retention of the marketing hour restriction was based on its desire

to protect its right not to work at night, and to protect its work from being taken by others. Those facts and circumstances are inimical to plaintiff's theory that the unions insisted on the restriction as the tool of the employer group and at their behest. On the contrary, the evidence established that the restriction was imposed after arm's length bargaining, including an overwhelming strike vote against night work, and was fashioned exclusively by the unions to serve their own interests—how long and what hours members shall work, what work they shall do, and what pay they shall receive. These are not objects which the anti-trust laws proscribe. They are conditions of employment, and as such are clearly within the labor exemption of the Sherman Act.

X. THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals reversed. It did not disturb any of the findings of fact of the District Court (R. 693). It rejected as a matter of law the "defendants' contention that an agreement pertaining to market operating hours is exempt from the antitrust laws since it was entered into in the self-interest of the employees to attain or maintain conditions deemed by the union relevant to the employees' working welfare" (R. 693). It held that setting market operating hours was an exclusive managerial prerogative wholly outside the unions' rightful concern (R. 693-695). Contractual limitation of market operating hours was illegal even though the limitation "'was imposed after arm's length bargaining . . .'" (R. 693). The requisite union abetment of non-labor groups united in a conspiracy to violate the antitrust laws was sufficiently established by an agreement secured by a union in consummation of ordinary collective bargaining negotiations (R. 697). According to the Court of Appeals, "whether it be called an agreement, a contract, or a conspiracy, is immaterial" (R. 697. It therefore concluded that the limitation upon market operating hours was "illegal and void because violative of the Sherman Act" (R. 697).

SUMMARY OF ARGUMENT

I

The limitation upon market operating hours had its origin in a strike in 1919 called in part to lessen the then prevailing 81 hour, 7 day work week; the successful outcome of the strike resulted in the establishment of the limitation on market operating hours in furtherance of the butchers' desire to shorten the working day and to keep from working night hours; it continues for that purpose. Collective bargaining on the subject of market operating hours is conducted at arm's length in good faith, identical in manner with the negotiation of any other subject, and the unions' position is determined exclusively by promotion of the self-interest of the employees they represent. The subject of market operating hours intimately embraces every aspect of wages, hours, and working conditions; resistance to removal or modification of the limitation is based on preservation of the butchers' wish not to work at night; accession to removal or modification requires agreement upon how many nights and how late into the night butchers shall work, the number of butchers to work at night, and the compensation for night work.

Collective bargaining and mutual agreement upon market operating hours can therefore no more violate the antitrust laws than can collective bargaining and mutual agreement upon vacations, health and welfare funds, work assignment, or any other subject involving wages, hours, and working conditions. The result is the same whether viewed through the lens of the National Labor Relations Act or the labor exemption of the Sherman Act. Subsuming every element of wages, hours, and working conditions, market operating hours is a mandatory subject of collective bargaining, and the negotiation of an agreement on it, backed by the right to strike, is the essence of protected activity under the National Labor Relations Act. The controversy is therefore not within the coverage, much less

the prohibition, of the Sherman Act. Furthermore, viewing the controversy as an aspect of commercial competition to which the Sherman Act extends, the labor exemption is clearly applicable. For the limitation upon market operating hours in origin and continuance was conceived and maintained, not by a combination of business men aided by a union engaged in a mercantile scheme offending the antitrust laws, but by the unions acting independently of any business men, exerting their own bargaining power in pursuit exclusively of their members' self-interest in their working welfare, and securing incorporation of the limitation into the collective bargaining agreements in consumation of this end.

II

The dispute is within the exclusive primary jurisdiction of the National Labor Relations Board. When activity is *arguably* within the protection or the prohibition of the National Labor Relations Act a controversy concerning it is within the sole competence of the Board. Commitment of the subject to the Board obtains even if the complaint is grounded in an alleged restraint of trade. And a federal court no less than a state court or administrative agency is required to defer to the Board's jurisdiction.

In this case, the controversy over market operating hours inescapably pertains to the hours butchers shall work, the work they shall have, and the compensation they shall receive. To achieve their end the unions resorted to collective bargaining backed by the right to strike. The matter is therefore to say the least arguably within the protection of the National Labor Relations Act.

But if market operating hours is not arguably a mandatory subject of collective bargaining, and negotiation coupled with the capacity to draw on economic pressure not arguably the protected means of dealing with the subject, the matter is then necessarily within the rubric

of activity arguably *prohibited* by the National Labor Relations Act. For the unions have insisted in collective bargaining upon the limitation, and to insist upon a non-mandatory subject is to refuse to bargain. The National Labor Relations Board is empowered to require cessation from that insistence, as well as from auxiliary conduct like strikes designed to effectuate it.

One way or the other, therefore, the controversy can be conclusively determined by the Board, either to validate or illegalize the unions' conduct, and effectively to stop it if illegal. To this situation the doctrine of primary jurisdiction clearly extends. For a court to decline or defer jurisdiction over an alleged antitrust violation in favor of an agency's determination of interrelated cognate questions falling within the purview of a regulatory statute is of course no innovation. Recourse to the agency has been required under the Interstate Commerce Act, the Shipping Act, the Packers and Stockyards Act, and the Federal Aviation Act. Prior resort is no less essential under the National Labor Relations Act. As with other regulatory statutes, so with the National Labor Relations Act, in no other way can responsible accommodation of antitrust policy with regulatory policy be achieved.

ARGUMENT

I. PRELIMINARY STATEMENT.

The crux of this case lies in the root finding that "the unions' insistence on the retention of the marketing hour restriction was based on its desire not to work at night, and to protect its work from being taken by others. . . . [T]he evidence established that the restriction was imposed after arm's length bargaining, including an overwhelming strike vote against night work, and was fashioned exclusively by the unions to serve their own interests—how long and what hours members shall work, what work they shall do, and what pay they shall receive" (R. 672).

Three analytically separate elements emerge from this finding. First, subsumed in the negotitation of market operating hours is determination of "how long and what hours members shall work, what work they shall do, and what pay they shall receive." Market operating hours is therefore a mandatory subject of collective bargaining, within the protected ambit of the National Labor Relations Act, for its essential ingredients are "rates of pay, wages, hours of employment, or other conditions of employment." NLRA, §§ 9(a), 8(d), 8(a)(5), 8(b)(3), 7. A subject within this class presents, properly speaking, no question of a labor exemption from the Sherman Act. For the Sherman Act does not cover, much less prohibit, activity within the field which defines mandatory bargaining. Commercial competition, not wages, hours, or working conditions, is the domain of the Sherman Act. To be sure, setting labor standards can and does influence mercantile rivalry; labor cost, the availability of men to work, and the conditions under which they toil necessarily enter into the price of goods and services and the time they can be marketed. But the Sherman Act is indifferent to the effect upon commercial competition which flows from the determination of labor standards. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503-504 and n. 24, 507, n. 25. For, whatever its proliferation, the matrix of the controversy is wages, hours, and working conditions.

The second element which emerges from the finding is that to get and keep contractual control of market operating hours the unions resorted to "arm's length bargaining, including an overwhelming strike vote against night work. . . ." Arm's-length bargaining denotes ends and means self-determined by the unions. Even within the area of commercial competition, absent union abetment of a business men's conspiracy to violate the antitrust laws, union activity conducted by a labor organization in its self-interest is immune from the Sherman Act. This is, properly speaking, the labor exemption. It means that, whether

or not the conduct charged as a restriction upon commercial competition would constitute an antitrust violation, the Sherman Act excepts union activity when the union, acting independently of aid to a business men's combination, exerts its own bargaining power to serve its own end.

The third element which emerges from the finding is the question whether its making is within the original competence of the District Court at all. Collective bargaining upon a subject is mandatory if it partakes of "rates of pay, wages, hours of employment, or other conditions of employment." Whether a controverted subject is within or without this class is initially for the National Labor Relations Board to decide. If mandatory, to bargain and strike for the purpose of obtaining accession to the union's demand is protected activity; if not mandatory, insistence to an impasse upon the demand is within the power of the Board to prohibit, as is a strike or cognate pressure in furtherance of the demand. The decisive adjudicatory role that is allotted to the Board places the determination of the controversy within its exclusive primary jurisdiction.

We shall treat in turn with each of these three elements inherent in the critical finding. We shall show, first, that market operating hours subsumes every aspect of "rates of pay, wages, hours of employment, or other conditions of employment," and is therefore a mandatory subject of collective bargaining outside the scope of the Sherman Act and within the protection of the National Labor Relations Act. We shall show, second, that even if market operating hours is *arguendo* within the area of commercial competition, the means employed to get and keep contractual control of it are within the labor exemption. We shall show, lastly, that the controversy is within the exclusive primary jurisdiction of the National Labor Relations Board. Determination of any of the three issues in petitioners' favor requires reversal of the judgment.

II. MARKET OPERATING HOURS SUBSUMES EVERY ELEMENT OF "RATES OF PAY, WAGES, HOURS OF EMPLOYMENT OR OTHER CONDITIONS OF EMPLOYMENT"; CONTRACTUAL CONTROL OF IT THROUGH COLLECTIVE BARGAINING IS THEREFORE WITHIN THE PROTECTED AMBIT OF THE NATIONAL LABOR RELATIONS ACT AND OUTSIDE THE SCOPE OF THE SHERMAN ACT.

Market operating hours is rooted in working hours, in wages, and in other conditions of employment. In origin and continuance its regulation by collective bargaining agreement responds directly to safeguarding the employees' interest in when they shall work, who shall do the work, how much work shall be done, and what wage shall be paid for the work. It is in these terms that the issue has been fought out at the bargaining table and by strike action and authorization.

A. No Night Work Is at the Heart of the Issue of Market Operating Hours.

At the heart of the unions' opposition to extension of market operating hours is the wish of the employees they represent not to work at night but to be home with their families (*supra*, pp. 47-48). This is the tradition of the Chicago area butchers. This is the sentiment they have voiced and voted. This is the way they want to live. The goal they seek through absence of night work is "time for happy, normal family life and social contacts with other families and friends." Daughtery, Labor Problems in American Industry, 202 (4th ed., 1938).

B. In Origin and Evolution Control of Market Operating Hours Is Designed to Shorten the Work Day and to Keep From Working Nights.

Limitation upon market operating hours began more than 45 years ago. In 1919 the operating hours of meat markets in Chicago were 7:00 a.m. to 7:00 p.m., Monday through Friday, 7:00 a.m. to 10:00 p.m. on Saturday, and 7:00 a.m. to 1:00 p.m. on Sunday (*supra*, pp. 13-14). The butcher worked the full 81 hours, 7 days per week, that

the market was open (*ibid.*). On November 1, 1919, the Chicago butchers went on strike; the objective of the strike was "more money and less hours"; the union "wanted to cut off an hour in the morning and an hour at night, and no Sunday hours" (*ibid.*).

The successful outcome of the strike resulted in the establishment of market operating hours at 8:00 a.m. to 6:00 p.m., Monday through Friday, 8:00 a.m. to 9:00 p.m. on Saturday, and no Sunday operation (*supra*, p. 14). The interrelationship of marketing and working hours as opposite sides of the same coin was shown on the face of the ensuing 1920 standard collective bargaining agreement "governing Meat Cutters in Retail Meat Markets in the City of Chicago, Illinois and Suburbs" (*ibid.*). After first providing that "Nine hours shall constitute the basic working day, hours shall be 8 A.M. to 6 P.M. excepting Saturdays and days preceding holidays beginning at 8 A.M. and quitting at 9 P.M.," it next provided that "*It is expressly understood that no customers will be served who come into the market after 6 P.M. and 9 P.M. on Saturdays and on days preceding holidays . . .*" (*ibid.*, emphasis supplied).

The same relationship of marketing and working hours appears on the face of the current agreements. The requirement that "Market Operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday" has its counterpart in the requirement that "the basic workday . . . shall be scheduled . . . to end no later than 6:00 p.m." (*supra*, pp. 11-12). And through the years, beginning in 1919, the stopping time for marketing and working evolved abreast of each other, the time for one corresponding to the time for the other, until finally fixed at 6:00 p.m. for both in 1947 (*supra*, p. 15).

And so, as the District Court found, "the marketing hour restriction originated as a result of the union's strike against the 81 hour, 7 day work week in 1919"; it was inserted in the ensuing 1920 collective bargaining agree-

ment "in juxtaposition to, and as an implementation of, the Article specifying hours of work for butchers"; and "through the years each change in hours of labor brought a corresponding change in market operating hours". (R. 662, 671-672).

C. The Employers' Proposals Show on Their Face That the Extension of Marketing Hours Means the Extension of Working Hours.

It is plain on the face of the proposals made to the unions by Jewel and other employers in the course of negotiations that the extension of market operating hours inevitably means the extension of working hours. Thus:

(1) *Jewel's proposal of November 1, 1957:* In proposing five nights of operation Monday through Friday, Jewel specifically stipulated that journeymen were to be on duty Thursday and Friday and that the first employee called on other nights must be a journeyman, with the workday to be concomitantly changed to an 8-hour flexible workday to be worked between the hours of 8:00 a.m. *to 9:00 p.m.*, Monday through Friday (*supra*, p. 26).

(2) *The all-employer proposal, Associated temporarily abstaining, of November 12, 1957:* In proposing Friday night operation, the offer specifically stipulated that a male employee was to be on duty during market operation, with a concomitant change in the workday to an 8-hour workday to be worked on Friday between the hours of 8:00 a.m. *to 9:00 p.m.* (*supra*, p. 28).

(3) *The all-employer proposal, Associated included, of November 15, 1957:* In proposing Friday night meat department operation effective October 6, 1958, the offer specifically stipulated that a male employee was to be on duty during market operation, with a concomitant alteration of the workday on Friday to an 8-hour day to be worked between the hours of 8:00 a.m. *to 9:00 p.m.* effective

with the commencement of Friday night operation (*supra*, pp. 28-29).

(4) *Jewel's proposal of November 22, 1957:* In proposing Friday night operation to 9:00 p.m., Jewel specifically stipulated that a male employee must be on duty at all hours that the market is open for the sale of meats, with the concomitant requirement that the employer is to have the option to work male employees after 6:00 p.m. at time and one half (*supra*, p. 31).

(5) *The all-employer proposal of September 12, 1961:* This proposal committed market operating hours to the unlimited discretion of the employer and in concomitant recognition of the night work required by this leave it provided for an employee to be "scheduled to work after 6:00 P.M."; it established a "supper period" to "end" no "later than 8:00 P.M."; it stipulated that the "hours and days to be worked by each employee shall be determined by the Employer"; and it mandated that "All employees may be required to work overtime" (*supra*, pp. 36-38). This proposal for unrestricted market operation reflected Jewel's forecast that the removal of the limitation upon market operating hours "would inevitably mean that the market operations would automatically be opened to seven days a week, twenty-four hours per day, of operation" (*supra*, p. 25). And in the 33 stores operated by Jewel outside the Chicago area, where no limitation upon market operating hours exists, Jewel has extended market operation in a substantial number of its stores to 11:00 P.M., to six nights per week, and to Sunday, *supra*, pp. 46-47).

(6) *Jewel's Offer No. 2, dated November 13, 1961:* In proposing night operations, this offer stipulated that a "journeyman must be on duty during all hours that fresh meat is offered for sale between the hours of 9:00 A.M. *and 9 P.M.* on Mondays, Thursdays, and Fridays," and "If the needs of our business require that an employee be on duty *after 6:00 P.M.* on Tuesdays, Wednesdays or Satur-

days, or at any time *on Sundays*, the first employee called to work during such hours must be a Journeyman Meat Cutter" (*supra*, pp. 42-43, emphasis supplied).

(7) In so many words, therefore, the employers' proposals for night marketing call for night work. Extension of marketing hours means extension of working hours. Opposition to extension of marketing hours is required to fulfill the butchers' wish not to work at night but to be home with their families. Indeed, excepting Jewel's Offer No. 1, dated November 13, 1961 (*supra*, p. 41), neither Jewel nor any other employer ever proposed to operate a meat department, either service or self-service, after 6:00 p.m. without employees on duty (*supra*, p. 54). And that offer, to which we now turn, is a delusion.

D. Jewel's Isolated and Belated Proposal to Operate a Self-Service Meat Department After 6:00 P.M. without Employees on Duty Is a Delusion.

Jewel's Offer No. 1 dated November 13, 1961, proposing to operate a self-service meat department after 6:00 p.m. without requiring butchers to be on duty, was not made to the unions until the very end of negotiations on November 16, 1961, "at the conclusion of a very long, harassing day" as the final negotiating meeting was "breaking up" (*supra*, p. 44). Its isolated character (the single proposal of that kind made by anyone in the course of three lengthy contract negotiations in 1957, 1959, and 1961) and its belated tender (not submitted to the unions until the very close of negotiations) renders it on these accounts alone suspect as a serious proposal. It did not constitute a bargaining objective but a litigation tactic. This aside, on the merits of the proposal, the unions' opposition to it is grounded in safeguarding the employees' interest in their work and hours. Thus:

1. A self-service meat department cannot operate after 6:00 p.m. without employees on duty.

(a) Entertainment of a proposal to operate a self-service meat department at night without butchers to man it requires belief that the department *can* operate after 6:00 p.m. without employees on duty. The unions do not accept that supposition but affirmatively reject it (*supra*, p. 49). Personnel is required to operate a self-service meat department after 6:00 p.m. in order to provide the essential services of rearranging the stock in the counters, to keep them orderly, to replenish stock depleted by sale, to clean the cases, and to furnish the custom cutting and other personal attention required by the customers (*ibid.*). The unions' experience with the sale of certain delicatessen items from the self-service counters after 6:00 p.m., ostensibly to be performed without the use of any personnel in the meat department at night, shows that virtually invariably a grocery clerk or supervisor will in the course of the night rearrange and restock the cases (*ibid.*). Indeed, an instance of cheating was uncovered in the very course of trial. In a Jewel store outside the Chicago area, ostensibly operated on Tuesday nights without employees on duty, customer service in the meat department was in fact furnished by two grocery clerks (*supra*, p. 49).

Accordingly, to operate a self-service meat department after 6:00 p.m. supposedly without personnel foreseeably means, not that the department will operate without employees, but that it will operate without butchers. But the butchers' concern is plainly twofold: *not* to work nights and *not* to have their work taken from them. Clearly no proposal can be acceptable to the unions which, while preserving the butchers' wish not to work after 6:00 p.m., does so by surrendering their work to others. And so, as the District Court found, "the union's insistence on the retention of the marketing hour restriction was based on its desire not to work at night, and to protect its work from being taken by others" (R. 672).

(b) The judgment of the unions that a self-service meat department cannot operate without employees on duty after 6:00 p.m., and that therefore a proposal based on the contrary assumption cannot be a genuine basis for negotiation, has solid support not only in their own experience but in other commanding considerations. Expert opinion holds the view that the satisfactory sale of fresh meat in a self-service meat department between 6:00 p.m. and 9:00 p.m. requires that butchers be on duty (*supra*, pp. 50-51). In the operation of its self-service meat departments Jewel itself posits as "a must" that there be "a man on the counter at all times. . . ." (*supra*, p. 52). Outside the Chicago area, in the territory in which no limitation upon market operating hours exists and in which Jewel operates 33 stores, with only few exceptions meat cutters are on duty whenever a meat department is open after 6:00 p.m. (*supra*, pp. 53-54). In every location but the Gary-Hammond area meat cutters are on duty every night that the meat department operates, and in the Gary-Hammond area meat cutters are on duty at least two nights a week and may be on duty additional nights a week as required by the volume of business (*supra*, pp. 53-54). And only when business is light does Jewel operate a meat department after 6:00 p.m. without a meat cutter on duty (*supra*, p. 54). Thus whenever business is brisk, and hence during the only time that the night operation of a meat department can be truly meaningful, meat cutters are required to be at work after 6:00 p.m. This conforms with the experience throughout the country, for night operation of a meat department without employees on duty is confined to the dull business nights of Monday, Tuesday, and Wednesday, there always being employees on duty on Thursday and Friday (*supra*, p. 51).

(c) The upshot is that to propose to operate a self-service meat department without employees on duty is to offer to play Hamlet without Hamlet. As the District Court found, "in stores where meat is sold at night it is

impractical to operate without either butchers or other employees. Someone must arrange, replenish and clean the counters and supply customer services" (R. 672); "the record here shows that night meat sales, even in self-service markets, require as a matter of practical operation the services of either butchers or other employees. . ." (R. 675). At the very least the unions' position and consequent stand in negotiations that personnel is required to operate a self-service meat department at night is surely reasonable and *bona fide*.

2. Even if it could be done, to operate a self-service meat department at night without employees would require either that butchers work in the service meat departments at night or would result in a loss of work and employment in the service meat departments.

Even if it were possible to operate a self-service meat department without employees on duty, a proposal to do so ignores the relationship of service to self-service markets. Service and self-service markets compete with each other (*supra*, p. 50). Night operation of self-service markets without employees on duty would necessitate night operation of service markets (*ibid.*) But a service market can only operate with employees on duty (*supra*, pp. 6-7, 42). Night operation of a service market would thus necessarily defeat the butchers' wish not to work at night. Furthermore, on the alternative that the self-service market operate at night but the service market remain closed, there would be a loss of work and employment by meat cutters employed in the service markets (*supra*, p. 50). For obviously if meat were available after 6:00 p.m. in a self-service market, but not a service market, a part of the trade that would otherwise patronize the service market would inevitably be siphoned off to the self-service market, and the loss of work and employment follows the loss of trade. Clearly then no proposal to operate a self-service market without employees on duty can be acceptable to the unions, for it impales them on the horns of the dilemma

that, if night operation of service markets is concomitantly granted, it causes the butchers in the service markets to work at night, and if it is not granted, it causes the butchers in the service markets to lose work and employment.

This interrelation of service and self-service markets is underscored by the fact that, considering only multiple store operators (those operating more than one store), the record shows that in the Chicago area in 1957 there were 443 self-service markets and 275 service markets, and in 1962 there were 609 self-service markets and 98 service markets (*supra*, pp. 9-10). The interrelationship is recognized in that part of the self-service contract which provides that: "The parties agree that in the event the market operating hours of service markets are extended at any time during the term hereof, the extension shall likewise apply to the market operating hours of self-service markets" (*supra*, p. 12). This provision had been drafted by Jewel itself for inclusion in the first self-service contract negotiated in 1952 (*supra*, p. 13). It reflects the position that Jewel has maintained throughout that no employer should have more favorable terms than any other employer (*ibid.*). It is therefore not surprising that, but for Jewel's isolated and belated Offer No. 1 dated November 13, 1961, every proposal made in the 1957, 1959, and 1961 negotiations for the operation of a meat department after 6:00 p.m. pertained to both service and self-service markets (*supra*, p. 54). And a proposal to operate a service market at night is inescapably a proposal to work at night.

3. Even if it could be done, to operate a self-service meat department at night without employees on duty would increase the butchers' work load.

Finally, as the District Court found (R. 672), even if it were possible to operate a self-service meat market without employees on duty, accession to a proposal to do so would add to the work load of the meat department employees

by (a) the increased work entailed in putting the counters in proper shape each morning after they have been disarranged the night before, and (b) the increased work required on Friday before 6:00 p.m. in order to cut and prepare the meats to be sold after 6:00 p.m. (*supra*, pp. 49-50).[11] Work load is a subject of mandatory collective

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[11] Night marketing hours would not increase the existing quantum of meat that customers purchase; it would redistribute the time within which the same quantum of meat would be sold. Thus, according to Jewel, some consumers prefer not to shop on Saturdays. If marketing hours were extended from 6:00 p.m. to 9:00 p.m. on Fridays, those consumers would presumably transfer their trade from Saturdays to Friday nights. To accommodate them the pre-6:00 p.m. Friday work load of butchers would have to be increased, else there would be no meat for the shopper to buy after 6:00 p.m. This increase in the pre-6:00 p.m. workload on Friday results, not from an increase in the amount of meat bought, but from a transfer of time of purchase from Saturdays to Friday nights.

No adverse effect on meat consumption is attributable to the limitation on marketing hours. In 1951 operating hours of meat markets in Chicago (*supra*, p. 15) and Cleveland (*infra*, p. 127) were limited to 6:00 p.m., Monday through Saturday. A careful study shows that in that year the Chicago and Cleveland consumer was near the top of the rank in meat consumption. Based on figures compiled by the Bureau of Labor Statistics, the American Meat Institute made a study of the average consumer expenditures for meat per housekeeping unit in 49 large cities during 1951 (R. 62x). Of the 49 cities, Chicago stood fourth highest in expenditures for all meat, second highest for fresh pork, and fifth highest for beef, while Cleveland stood third highest for all meat, fourth highest for total beef, second highest for round steak, and fifth highest for total veal (R. 65x). Of the eleven cities with a population of one million and over, Chicago stood third highest in expenditures for all meat, highest for pork, and third highest for beef, while Cleveland stood second highest for total meat, second highest for total beef, and fourth highest for total veal and total pork (R. 66x).

Thus, as the District Court found, the evidence did not "in any way establish that less meat is consumed in this area, in proportion to population and income, because of the restriction, than

bargaining.[12] Limiting marketing operating hours to 6:00 p.m. thus fulfills the unions' interest in assuring against an increase in work load.

E. Wages Are an Essential Constituent of the Extension of Market Operating Hours.

Wages join hours and work as essential constituents of market operating hours. Because working at night is an indispensable ingredient of extension of marketing hours, negotiations throughout have fixed on the question of the premium, if any, to be paid for night work. Proposals ranged from zero, to 25 cents per hour, to a half-time premium (*supra*, pp. 21-22, 25, 26-27, 28, 29, 31, 37, 43). Increase in the basic wage rate has also been explored to induce assent to night work (*supra*, pp. 21-22, 25). The increase was sometimes tied to concessions on other issues as well (*supra*, p. 25). The objective behind an enhanced wage offer in whatever form it took was to make it sufficiently high so that the unions would endeavor "to sell" night work to the members, but not so high that the increased labor cost would be unattractive to the employers (*supra*, pp. 21-22). As expressed by Jewel in its Offer No. 2 dated November 13, 1961, the compensation for night

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in areas where fresh meat is sold at night. In fact, the objective statistics indicated that the restriction had no discernible effect" (R. 676). Other factors determine meat consumption. The meat purchased by a family is related directly to its income, the higher the income the greater the amount that is spent for meat (R. 76x, 79x). In addition to income, it reflects also "differences among households in race, nationality and regional backgrounds, education, size and other characteristics" (R. 79x). But meat consumption is not influenced by the absence of night shopping. It would be foolish to suppose that a New York or Los Angeles family buys more fresh meat than a comparable Chicago or Cleveland family because the meat in New York and Los Angeles can be purchased after 6:00 p.m.

[12] *Beacon Piece Dyeing & Finishing Co.*, 121 NLRB 953; *Woodside Cotton Mills Co.*, 21 NLRB 42, 54-55.

work contained in that proposal was made in "the belief that adequate remuneration for work after 6:00 P.M. may offset the desire of your membership not to work after 6:00 P.M. . . ." (*supra*, p. 42). The unions do not demur that, given sufficiently attractive payment for night work, "there would be some possibility of having it," for "certainly people have a way of changing their minds," but they divide from the employers on the question of how much is sufficient (*supra*, pp. 54-55). And thus far no money offer made by the employers has been high enough to persuade the employees to work at night (*ibid.*).

F. Regulation of Market Operating Hours By Collective Bargaining Agreement Exists in Areas Other Than Chicago.

Regulation of market operating hours by collective bargaining agreement is not confined to the Chicago area, but exists elsewhere throughout the country (*infra*, pp. 127-131). As the District Court found, "Similar contact provisions, or with variants for a single night operation, are in operation in other metropolitan areas" (R. 664). Included are the major metropolitan areas of Cleveland, Seattle, and St. Paul (*infra*, pp. 127-129, 130). The containment of the subject within labor agreements is relevant to show that it is within the scope of employment standards fixed by collective bargaining. *Railroad Telegraphers* v. *Ch. & N. W. R. Co.*, 362 U.S. 330, 336, *N.L.R.B.* v. *American National Ins. Co.*, 343 U.S. 395, 405-407; *California Sportswear & Dress. Asso.*, 54 FTC 835, 874.

G. Market Operating Hours Cannot Be Deprived of Its Labor Attributes By Invoking the Talisman of "Managerial Prerogative."

The upshot is that, as the District Court found, the limitation upon market operating hours "was fashioned exclusively by the unions to serve their own interests—how long and what hours members shall work, what work they shall do, and what pay they shall receive" (R. 672). Wages,

hours and working conditions, not suppression of commercial competition in the sale of fresh meat after 6:00 p.m., is its sole orientation.

The court below would drain this determination of its relevance by its *ipse dixit* that the "rights of employees" on the question of hours is confined to "the number of hours per day that any one shall be required to work . . ." (R. 694). According to this thesis, while employees may insist that they shall not work longer than a particular number of hours during a day, they have no self-protective interest in whether they shall work at night, through midnight or the dawn, on Sundays, or on holidays. The practical import is readily discernible from the 33 stores operated by Jewel outside the Chicago area, where no limitation upon market operating hours exists: two stores operate the meat department to 11:00 p.m., eight stores operate the meat department six nights per week to 9:00 p.m. Monday through Saturday, and seven stores operate the meat department on Sundays (*supra*, pp. 46-47). Adoption of the view of the court below means that employees cannot protest working on week days to 11:00 P.M., working on Saturdays after 6:00 P.M., or working on Sundays. The court below disdains as an "emotionally" expressed appeal the position that "union butchers should be given an opportunity to be with their children on Friday evenings . . ." (R. 695-696). And, since the butchers cannot protest the parts of the day or the days of the week they shall work, it is difficult to understand by what logic the court below grants them the right to protest the number of required hours of work per day.

The court below justifies its conclusion upon the ground that the determination of the hours that a place of business shall be open is a managerial prerogative to be exercised exclusively by the proprietor. Its thinking can be gleaned from the phrases it employed to express this view: "responsibilities resting upon a proprietor," "proprietary functions," "the judgment of the owner of the

business," "the prerogatives of the employer," his "inherent proprietary rights," the "proprietary function which an employer has the exclusive right to determine" (R. 694-695). The employees can have no say, therefore, in determining the parts of the day or the days of the week that they shall work because this would interfere with the employer's prerogative to decide for himself when his business shall be open. The essence of this view is that an operational decision by management must be given exclusive dominion notwithstanding its detrimental impact upon the working welfare of the employees.

This view is not new to the court below, and it has been expressly disapproved by this Court. *Railroad Telegraphers* v. *Chicago and Northwestern R. Co.*, 362 U.S. 330, reversing, 264 F.2d 254 (C.A. 7). In the latter case the union contested the employer's decision to abandon or consolidate unnecessary railroad stations because it would adversely affect the employment of telegraphers. The court below held that the union's demand that no position "will be abolished except by agreement between the Carrier and the Organization" was outside the valid scope of bargainable issues. 264 F.2d at 256, 260. And this for the reason that the "proposed contract change in the case before us represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations" (*id.* at 259). This earlier expressed monarchial concept of absolute managerial prerogative—highlighted in this case by the anachronistic advertence to the employer's role "as master in the master and servant relationship" (R. 695)—underpins the present decision as well.

But this Court disapproved. Addressing itself precisely to the claim of usurpation of managerial prerogative, and observing that at issue was "the union's effort to negotiate about the job security of its members," this Court stated that: "We cannot agree with the Court of Appeals.

. . . It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large." 362 U.S. at 336, 338.

Faithful to this Court's decision in *Chicago and North Western,* the District Court explicitly drew on it to support its conclusion. After quoting from this Court's opinion, the District Court explained that: "Under this rationale, since the record here shows that night meat sales, even in self-service markets, require as a matter of practical operation the services of either butchers or other employees, the unions' insistence on the restriction to protect their work and job security, should be deemed a proper labor goal, and in no way a usurpation of managerial prerogative. Therefore, that decision further substantiates the conclusion that the marketing hour restriction here, in protecting butchers against night hours and a loss of work is within the labor exemption of the Sherman Act" (R. 675).

Similarly, strongly influenced by this Court's rationale in *Chicago and North Western,* the National Labor Relations Board has held that an employer's decision to subcontract a business operation is a mandatory subject of collective bargaining,[13] rejecting the dissenting position that whether to end or continue a business operation is "a managerial determination, and, therefore, a prerogative exercisable without negotiation."[14] Business functions and workers' protections must be balanced. *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 549. Even in the case of a union's stipulated violation of the antitrust laws, this

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[13] *Town & Country Mfg. Co.,* 136 NLRB 1022, enforced, 316 F. 2d 846 (C.A. 5); *Fibreboard Paper Products Corp.,* 138 NLRB 550, enforced, 322 F. 2d 411 (C.A.D.C.), cert. granted, 375 U.S. 963.

[14] 136 NLRB at 1033.

Court has carefully observed that the redress it upheld against the offending union did not impair any interest the union had in "job or wage competition or economic interrelationship of any kind. . ." *Los Angeles Meat and Provision Drivers Union* v. *United States*, 371 U.S. 94, 103. "To believe that labor union interests may not properly extend beyond mere direct job and wage competition is to ignore not only economic and social realities so obvious as not to need mention, but also the graphic lessons of American labor union history." *Id.* at 104, concurring opinion, Mr. Justice Goldberg.

There is in truth no labor standard which cannot be expressed as an indispensable constituent of managerial dominion. Labor cost is a prime determinant of price policy; work load and product output go together; whether and when men will work underlies production scheduling. To invoke so-called managerial prerogative as a basis of decision is therefore question-begging. For it assumes that the employer's interest should be accorded priority. One can with equal propriety begin with the assumption that the employees' interest is entitled to precedence. There is no *a priori* basis for preferring one over the other, and a choice between the two is necessarily based on a value judgment. In this case to subordinate the employees' interest in when they shall work to the employer's interest in when his business shall be open is obviously to opt among rival notions of the good life. The choice is no less real because a judge makes it in the name of managerial prerogative.

But for a judge to make such a choice is incompatible with the institution of collective bargaining. Its genius is that it commits the composition of competing values to private decision and not to governmental determination either by the judiciary or other officialdom. National labor policy puts its faith in "the practice and procedure of free and private collective bargaining" (S. Rep. No. 105, 80th Cong., 1st Sess., 8, in 1 Leg. Hist. LMRA 414); "Gov-

ernment decisions should not be substituted for free agreement" (*id.* at 2, in *id.* at 408); the making of agreements is not to be trammelled by "governmental supervision of their terms" (S. Rep. No. 573, 74th Cong., 1st Sess., 12.) ". . . Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 488. A negotiator is free to push his view whether or not it is "rightly or wrongly" held. *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, 294. And protected recourse to concerted activity to back a position is not dependent on the "wisdom or unwisdom of the men, their justification or lack of it" (*N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 370 U.S. 9, 16); "the reasonableness of workers' decisions" is not the criterion (*N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9, 16). Private autonomy is thus the essence of the system. To intrude into it a judicial judgment in favor of the employer's interest in the name of managerial prerogative puts the "Government's thumb on the scales"[15] incompatibly with free and private collective bargaining. For when the judge weighs the competing values he takes from the parties their right to strike their own balance.

In short, regulation of market operating hours by collective bargaining agreement cannot be deprived of its labor attributes by invoking the talisman of "managerial prerogative." It is no different from, and no less within the ambit of collective bargaining than, a contest over the abandonment or consolidation of unnecessary railroad stations (*Railroad Telegraphers* v. *Ch. & N.W. R. Co.*, 362 U.S. 330); the minimum equipment rental of leased vehicles (*Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, 362 U.S. 605); the sale and use of labor saving machinery (truck mixers) (*United States* v. *Hod Carriers*, 313 U.S. 539, affirming, 37 F. Supp. 191 (N.D. Ill.)); the use of recorded music sup-

[15] *American Communications Assn.* v. *Douds*, 339 U.S. 382, 401.

planting the services of live musicians (*United States* v. *American Federation of Musicians,* 318 U.S. 741, affirming, 47 F. Supp. 304 (N.D. Ill.)); in the ladies garment industry, "(1) Limitations on competition among contractors by restricting manufacturers' and jobbers' use of contractors, primarily through a contract-designation procedure, and by determining prices to be paid to contractors for their services, and (2) Restraints on production by members of the employer associations, resulting from contract limitations on the opening of additional plants or the acquisition of interests in other concerns producing women's sportswear" (*California Sportswear & Dress Assn.,* 54 FTC 835); and contracting out a business operation in preference to its performance with the employer's own equipment (*Fibreboard Paper Products Corp.,* 138 NLRB 550, enforced, 322 F. 2d 411 (C.A.D.C.), cert. granted, 375 U.S. 963; *Town & Country Mfg Co.,* 136 NLRB 1022, enforced, 316 F. 2d 846 (C.A. 5)).

Accordingly, as in *Local 24, Teamsters* v. *Oliver,* 358 U.S. 283, 294-295, it "is not necessary to attempt to set precise outside limits to the subject matter properly included within the scope of mandatory collective bargaining . . . to hold . . . that the obligation under § 8(d)" of the National Labor Relations Act on Jewel and the unions "to bargain collectively 'with respect to wages, hours, and other terms and conditions of employment' and to embody their understanding in 'a written contract incorporating any agreement reached,' found an expression" in the contractual limitation of market operating hours. "And certainly bargaining on this subject through their representatives was a right of the employees protected by § 7 of the Act." Far from being within the scope, much less the prohibition, of the Sherman Act, the workers' activity was within the protected ambit of the National Labor Relations Act. How can it be otherwise when at bottom the controversy is about whether or not the men should work at night?

III. REGULATION OF MARKET OPERATING HOURS BY COLLECTIVE BARGAINING AGREEMENT IS WITHIN THE LABOR EXEMPTION OF THE SHERMAN ACT.

The second branch of our argument proceeds on the assumption that market operating hours is not within the scope of mandatory collective bargaining but is to be treated as an aspect of commercial competition which, but for the applicability of the labor exemption, would be subject to the rule that a trade restraint is within the prohibition of the Sherman Act if it unreasonably restricts mercantile rivalry. On this hypothesis, viewing the labor activity through the lens of the labor exemption of the Sherman Act, the question is whether regulation of market operating hours by collective bargaining agreement is immune from antitrust proscription because it is the product of the unions' efforts acting on their own in their self-interest free of aid to a business men's combination.

A. The Complaint Rests Upon an Allegation of Conspiracy Between Associated and the Unions; That Allegation Was Indispensable to State a Claim Under the Antitrust Laws Against the Unions; and That Allegation Was Not Only Unproved But Disproved.

Union activity conducted by a labor organization in the self-interest of the employees it represents to attain or maintain conditions deemed by the union relevant to the employees' working welfare is exempt from the Sherman Act. *United States* v. *Hutcheson*, 312 U.S. 219. Immunity exists "So long as a union acts in its self-interest and does not combine with non-labor groups. . . ." *Id.* at 232. The exemption is inapplicable only when, and to the extent that, the union aids a combination of business men themselves united in a plan which offends the antitrust laws. *Allen-Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U.S. 797. The heart of the qualification upon the labor exemption is expressed in the following passages from *Allen-Bradley* (*id.* at 808-809, 810):

> . . . we think Congress never intended that unions could, consistently with the Sherman Act, *aid non-*

labor groups to create business monopolies and to control the marketing of goods and services.

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Employers and the union did there make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. *We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone.* It was but one element in a far larger program in which *contractors and manufacturers united with one another* to monopolize all the business in New York City, to bar all other business from that area, and to charge the public prices above the competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result *acting alone*, it would have been the natural consequences of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. [Citation omitted.] But when the unions participated *with a combination of business men* who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

* * * * *

[We find] no purpose of Congress to immunize labor unions who *aid and abet manufacturers and traders in violating the Sherman Act. . . .*

Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, *dependent upon whether the union acts alone or in combination with business groups.* [Emphasis supplied.]

The labor exemption is thus inapplicable only if three factors are present: (1) there must exist "a combination of business men"—a program in which business men are

"united with one another"; (2) the activity of that combination of business men must of itself offend the antitrust laws; and (3) the labor organization must aid and abet that combination of business men in violating the antitrust laws. In 1947, in deliberating on the Taft-Hartley amendments, and in 1959, in deliberating on the Landrum-Griffin amendments, Congress considered and voted down removal of the labor exemption.[16]

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[16] In 1947, the House bill, as reported and passed, amended Section 6 of the Clayton Act to provide that (H.R. 3020, 80th Cong., 1st Sess., Sec. 301(b), in 1 Leg. Hist. LMRA 93-94, 220-221):

> . . . it shall not be within the legitimate objects of labor organizations or the officers, representatives, or members thereof, to make any contract, or to engage in any combination or conspiracy, in restraint of commerce, if one of the purposes or a necessary effect of such contract, combination, or conspiracy is to join or combine with any person to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions, upon the purchase, sale, or use of any product, material, machine, or equipment. . . .

Similarly, Senators Taft, Ball, Donnell, and Jenner proposed that the Clayton Act and the Norris LaGuardia Act (S. Rep. No. 105, 80th Cong., 1st Sess., 55-56, in 1 Leg. Hist. LMRA 461-462):

> shall not be applicable . . . in respect to any contract, combination, or conspiracy, in restraint of commerce, to which a labor organization is a party, if one of the purposes of such contract, combination, or conspiracy is to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions upon the purchase, sale, or use of any material, machines or equipment.

In introducing this amendment, Senator Ball explained, "That language is designed to correct the interpretation of the Norris-LaGuardia and Clayton Acts made by the Supreme Court in the Hutcheson case [312 U.S. 219], and a number of other cases brought by former Assistant Attorney General Thurman Arnold, when he attempted to break up monopolistic practices on the part of labor unions, sometimes acting on their own, sometimes in conspiracy with employers. They were engaging in all kind of price-fixing. They were attempting to determine, on their own respon-

Congress has thus confirmed its continuing vitality.[17]

In this case, obedient to settled law, Jewel framed its complaint to plead a case outside the scope of the labor exemption. To show a combination of business men united in an antitrust violation, the complaint alleged a mercantile conspiracy to suppress commercial competition in the sale of fresh meat after 6:00 p.m. among Associated, its mem-

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sibility, what products should be used in industry, what kind of machines, and what products the public should be entitled to buy." 93 Cong. Rec. 4837, in 2 Leg. Hist. LMRA 1354. The Senate defeated the proposed amendment. 93 Cong. Rec. 4847, in 2 Leg. Hist. LMRA 1370. The conference agreement thereafter rejected the House bill's imposition of antitrust restrictions upon labor organizations.

In 1959, the House voted down an amendment of the National Labor Relations Act providing that (105 Cong. Rec. 15853, in 2 Leg. Hist. LMRDA 1685):

> Nothing contained in this Act shall be deemed to make lawful any contract, combination, or conspiracy in restraint of trade or commerce entered into between two or more labor organizations (whether or not affiliated with the same national or international labor organization) or between any individual labor organization and any employer or other person or persons, which contract, combination, or conspiracy if entered into by persons other than labor organizations would be in violation of the antitrust laws. Nothing contained in this Act or in the Act of March 23, 1932 (29 U.S.C. 101) shall be deemed to exempt from the application of the antitrust laws of the United States or of any State or territory thereof any employer, labor organization, or other person who becomes a party to or engages or participates in any such contract, combination, or conspiracy in restraint of trade or commerce: *Provided, however,* that this section shall not be construed to limit or restrict the right to strike except as otherwise provided in this Act.

See also, 105 Cong. Rec. 12136-37, 15532-35, in 2 Leg. Hist. LMRDA 1507-08, 1569-71.

[17] *Gullet Gin Co.* v. *N.L.R.B.*, 340 U.S. 361, 365-366; *Queensboro Farm Products* v. *Wickard*, 137 F. 2d 969, 977 (C.A. 2).

bers, and its secretary and treasurer; and to draw the unions into this orbit, the complaint averred that they abetted Associated's alleged scheme as co-conspirators. Thus, paragraph 15 first alleged "an unlawful combination and conspiracy to suppress competition among retail meat markets in the Chicago area and to wholly prevent the sale of meat and meat products before 9:00 A.M. or after 6:00 P.M. Mondays through Saturdays" (R. 22); paragraph 16(d) then alleged that the "co-conspirator members of defendant Associated have agreed among themselves to insist that all collective bargaining agreements" shall contain limitations on market operating hours; paragraph 16(e) alleged that "Associated, its members and officers have conspired and agreed with the other defendants [the unions]" to this end; paragraph 16(f) alleged that the "defendant unions, their officers and members have acted as the enforcing agent of the conspiracy" (R. 23). Paragraph 18 referred to "defendant unions, their officers and members, *conspiring* together with Associated, Bromann, and Associated's employer members" (R. 23); paragraph 19 referred to the insistence upon the limitation of market operating hours by "defendant Associated and its *co-conspirator members* and Bromann and the defendant unions, their officers and members" (R. 24); and paragraph 20 stated that "In furtherance of *this conspiracy* . . . Defendant Associated refused to enter into an agreement permitting night openings and the defendant unions supported and abetted it in that refusal" (R. 24) (emphasis supplied).

A conspiracy between Associated and the unions was thus the centerpiece of the complaint. The Court of Appeals, the District Court, and Jewel united in that reading. In dismissing the complaint against Associated and Bromann at the close of Jewel's case, the District Court observed that "the gist of the complaint is that there is and has been a *conspiracy* among and between Bromann, Associated, and the defendant Unions" (R. 683, emphasis sup-

plied). The District Court had similarly observed, in its pretrial opinion denying the unions' initial motion to dismiss, the complaint charges that "defendant union[s] and their officers *conspired* with Associated Food Retailers of Greater Chicago, Inc., . . . to suppress competition among retail meat markets in the Chicago area, and to prevent the sale of fresh meats . . . before 9 A.M. or after 6 P.M. Mondays through Saturdays. . . ." (R. 58, emphasis supplied). In affirming the District Court's ruling on interlocutory appeal, the court below likewise recognized that an "alleged combination or conspiracy" among Associated, its members, and Bromann, aided and abetted by the unions as co-conspirators, was at the heart of the complaint, observing that the "alleged conspiracy" of business men could not be saved "by making the union a co-conspirator. . . ." 274 F. 2d at 220, 222. And, in its brief to the court below on the first appeal, Jewel summarized its own complaint in identical fashion: "The Complaint here is made against, and relief is sought from the union's actions, not alone, but in combination with Associated Food Retailers in a conspiracy to restrain commerce" (p. 63); the "complaint plainly alleges a conspiracy between the defendant employer association and the unions to achieve the employer conspirators' desire not to face plaintiff's competition" (p. 50, see also, pp. 1-2, 5-6, 9, 10, 56).

In short, the complaint made Associated the villain of the piece in order to supply the essential element of a labor-assisted business men's conspiracy without which it was not possible to state an antitrust claim against the unions. But, as the District Court found, the alleged conspiracy "failed to withstand the 'crucible of trial' " (R. 670). It dismissed the complaint against Associated and Bromann at the close of Jewel's case because "the record was devoid of any evidence to support a finding of conspiracy" (R. 670, 683-684, 658). It found that, "realistically speaking, there is absent any evidence showing Bromann or Asso-

ciated, or both, conspired with defendant Unions in forcing the restrictive clause upon Jewel" (R. 684).

The lack of evidence of conspiracy at the close of Jewel's case was confirmed by positive evidence disproving conspiracy at the close of all the evidence. The District Court found that "the marketing hour restriction originated as a result of the Union's strike against the 81 hour, 7 day work week in 1919, long before plaintiff [Jewel] sold meat or Associated was organized" (R. 671). And it further found that (R. 670):

> The record showed only that Bromann, on behalf of Associated, which represented some 1,000 individual and independent food stores, dealt with the unions at arm's length. At no time did he receive a direction to demand a 6 P.M. closing; nor did he make any such demand. On the contrary, Associated, through Bromann, joined in the all-employer offer of November 15, 1957, demanding the elimination of the restriction on night marketing, and specifically requested that change from the union representative at a sub-committee meeting [*supra*, pp. 28-29]. Even Vorbeck's letter of October 1, 1961, to his company, stated that Associated did not oppose night work, but that some opposition came from other chains [*supra*, pp. 38-39]. This fluctuating opposition by some employers to night operations because of their high cost is hardly tantamount to a conspiracy with the unions. Hence, any attempt to reassert that theory must fail.

Other factors negate a conspiracy. George P. Kokalis, a chain store operator who in 1957 favored night operations (*supra*, p. 51, n. 9), testified that "Bromann was in accord" with night operations (R. 422). In the 1959 and 1961 negotiations Associated's position on night operations was identical with that of all employers (*supra*, pp. 34-35, 36-37, 38-39), if not indeed more favorably inclined towards night operations in 1961 than most (*supra*, pp. 38-39). The members of Associated have no mercantile characteristics different from other merchants (*supra*, p. 10).

And Jewel's representative himself described Bromann as an "able negotiator" who would be "acceptable" to the entire employer group as its spokesman (*supra*, p. 21).

With the finding that Associated and Bromann engaged in no conspiracy, there disappeared the sole conspiracy of business men alleged in the complaint, and as the necessary consequence there vanished as well any basis for a claim that the unions violated the antitrust laws. For the unions cannot be held as co-conspirators in a conspiracy which does not exist. And that should have been the end of this case.

B. The Containment of the Market Operating Hours Provision in a Collective Bargaining Agreement Which Is the Consummation of Joint Negotiations Is Not a Sufficient Basis to Remove the Applicability of the Labor Exemption.

Deprived of the fact of a business men's conspiracy as a predicate for finding an antitrust violation, the court below broke new ground. It held that the containment of the limitation upon market operating hours in a collective bargaining agreement which is the consummation of joint negotations of itself establishes that it is the product of an illicit business men-union combination (R. 693, 694, 697). In a verbal miasma, the court below stated that "the unions, Associated Food Retailers and Bromann, its secretary, entered into a combination or agreement, which constituted a conspiracy"; it erroneously attributed to this Court the use of the "words 'conspiracy' and 'contract' interchangeably";[18] and it concluded that "Whether it be called an

[18] Cited to support this conclusion, *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, establishes the opposite, for it is explicitly premised on *Allen Bradley*, this Court stating that "Since these cases were taken the important question of the applicability of the Sherman Act to a *conspiracy* between labor union and business groups has been decided by us. We held that such a *conspiracy* to restrain trade violated the Sherman Act" (*id.* at 400, emphasis supplied).

agreement, a contract or a conspiracy, is immaterial" (R. 697). Since the only identifiable element in this new theory is common participation in joint negotiations, its reach is not confined to Associated but engulfs all employers engaged in group bargaining. Its enormity is evident from the District Court's findings that the employer group and the union group each "formulates its position independently" (R. 664-665), and that the limitation upon market operating hours "was imposed after arm's length bargaining . . ." (R. 672). And the new theory destroys the labor exemption. For unions operate through agreements reached as a result of collective bargaining, and if that act suffices to establish forbidden concert with a non-labor group, immunity vanishes.

At stake, therefore, is the labor exemption itself. For it cannot survive if it is inapplicable even though, as we now show, nothing appears except an aboveboard collective bargaining agreement which is the product of joint negotiations conducted at arm's length.[19]

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[19] Untenable on its merits, the new theory is so gross a shift from the complaint that "elemental concepts of procedural due process" bar its adoption. *N.L.R.B.* v. *H.E. Fletcher Co.*, 298 F. 2d 594, 601 (C.A. 1). Jewel never moved to amend its complaint to incorporate the new theory. It declined to commit itself to this theory in argument at the close of its case (Tr. 609). It did not fully articulate it until its post-trial brief after all the evidence was in. It therefore prevailed on a claim which was procedurally barred because not alleged, not the subject of discovery, and not tried. *Ibid.*; *Meadow Gold Products Co.* v. *Wright*, 278 F. 2d 867, 868-869 (C.A.D.C.); *Cr. & O. Ry. Co.* v. *Newman*, 243 F. 2d 804, 812-813 (C.A. 6); *Bullen* v. *deBretteville*, 239 F. 2d 824, 833-834 (C.A. 9), cert. denied, 353 U.S. 947; *United States* v. *Ahtanum Irr. District*, 124 F. Supp. 818, 827 (E.D. Wash). It is ironic that, to survive a motion to dismiss the complaint, Jewel insisted that it was proceeding on the basis of "a conspiracy between the defendant employer association and the unions" (*supra*, p. 86), but that to prevail after trial it urged that it needed to show only that the "union defendants and various employers" engaged "in jointly negotiating the contract . . ." (Jewel brief below, p. 29, see also, pp. 14, 28, 29, 39, 62-64).

1. Bargaining is at arm's length and the agreement reached aboveboard.

The limitation upon market operating hours, designed and maintained by the unions to serve the working welfare of the employees they represent, is achieved solely through the unions' exertion of their own bargaining power. The limitation was born in a strike in 1919 (*supra*, p. 14). It was sheltered by "an overwhelming strike vote against night work" in 1957 (R. 672, *supra*, p. 33). It is maintained by union strength alone.

Marketing operating hours is but one of numerous issues identically hammered out at the bargaining table. Negotiations are joint but bargaining is at arm's length. Joint negotiations were instituted in 1941 by the unions in order to strengthen their bargaining position (*supra*, p. 18). The unions as a group and the employers as a group formulate their positions independently of each other. On the union side, the unions' initial demands are based on a preliminary survey of the members' wishes; in the course of negotiations the wishes of the members continue to be consulted; as negotiations go on the union representatives caucus from time to time to determine their bargaining positions; and any settlement reached is tentative until approved by the members at contract ratification meetings (*supra*, pp. 16-18).[20] On the employers' side the employers meet in advance of negotiations to explore the objec-

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[20] The minute detail in which the members are apprised of the course of negotiations prior to their vote upon the tentative settlement is shown in the minutes of the 1957, 1959, and 1961 contract ratification meetings of Local 546. These minutes were offered into evidence but not received and appear in the record as offers of proof (R. 592-593, 595-596, 598-599, 177x-254x). The minutes should be considered for they are competent to prove what transpired at the meetings. 4 Wigmore, Evidence, § 1074, p. 101(3) (3d ed.); 32 Corpus Jur. 2d, Evidence, § 701; *Lano* v. *Rochester Germicide Co.*, 113 N.W. 2d 460, 464, 44 CCH Lab. Cas. ¶ 17, 420, p. 26, 062 (Minn. Sup. Ct.).

tives they seek in negotiations and in the course of negotiations they caucus from time to time to determine their bargaining positions (*ibid.*). In negotiations an employer chairman and a union chairman act as the spokesmen for their respective groups (*ibid.*), and, as expressed by Jewel's counsel in a leading question, "You would horse-trade back and forth" (R. 140). As the consummation of negotiations the employers and unions sign separate but identical agreements (*supra*, p. 18). There is thus nothing in the conduct of negotiations which remotely suggests business men-union connivance.

Nor is there the slightest basis for Jewel's oblique suggestion that, unlike other bargaining issues, the unions' position upon market operating hours is determined by and obedient to the position of the majority of the employers on the subject. The entire record refutes the claim. The *unanimous* employer proposal of November 15, 1957 for night operation was rejected by the unions (*supra*, pp. 28-30). The *unanimous* employer position in the 1958 negotiations for removal of all restrictions on market operating hours did not win the unions' assent (*supra*, pp. 34-35). The *unanimous* employer proposal of September 12, 1961 to commit market operating hours to the employers' discretion did not achieve the unions' concurrence (*supra*, pp. 36-37). Nor did it avail the employers that in the 1961 negotiations the "principal demands which employers" sought included "complete removal from the contract of all restrictions on market operating hours" (*supra*, p. 39). It is therefore not surprising, as the following question and answer shows, that Jewel's counsel was unable to lead R. Emmett Kelly, the unions' chief spokesman, into an admission that the employers' position determined the unions' position on market operating hours (R. 132):

> Q. Now, I will ask you if it is fair to summarize that to say that you were telling your membership that this whole controversy really is a controversy

between Jewel on the one hand and the rest of the industry and your affiliated locals on the other, and if it should be that we get night operations, Jewel is responsible for breaking up the industry pattern; isn't that correct?

A. Mr. Christensen, on the first part of your question, may I have it repeated, please?

MR. CHRISTENSEN: Certainly.

(Question read.)

BY THE WITNESS:

A. No, sir, that is not correct.

The fact is that at no time has any union representative had any agreement or understanding with any employer to insist on maintaining opposition to night marketing hours; the position of the union representatives on the subject is based exclusively upon what they regard to be the best self-interest of the members (*supra*, p. 55).

And the fact also is that the only possible difference between Jewel's position on market operating hours and that of the other employers is that Jewel persists in seeking the unions' concurrence in its removal after the other employers have recognized the futility of the quest and have turned to concentrating on those of their demands which are realistically attainable. Were it true that the position of a majority of the employers on market operating hours is determinative of the position of the unions on the subject there would not now be a limitation upon market operating hours. But the truth is the other way. The unions are hardly likely to give up 45 years of history on the say-so of any number of employers, whether one, a minority, a majority, or all.

Also specious is Jewel's pretense that it is the sole steadfast crusader among the employers in striving to lift the market operating hours limitation. Its self-righteousness is belied by its own conduct at the close of the 1957

negotiations. For, after first asking R. Emmett Kelly to submit to the members Jewel's proposal of November 22, 1957 which included provision for night operations *and* female wrappers (*supra*, p. 31), it then requested that, if the members rejected that proposal, the same proposal should be submitted to the members but this time with night operation *deleted* and female wrappers *retained* (*supra*, p. 32). Thus, in choosing between the two, Jewel gave priority to female wrappers over night operations.

Finally, Jewel's position on the issue of health and welfare at the close of the 1961 negotiations exposes the fallacy of its notion that an employer is victimized by a business men-union combination directed at it if the position it maintains is contrary to that of the other negotiators. At the close of the 1961 negotiations on November 16, unlike all other employers, Jewel persisted in its position that the participation of the employees in the employer's individual health and welfare plan should not be cost-free to the employees (*supra*, pp. 43-44), and it did not yield this position and assent to the industry settlement until January 2, 1962 (*supra*, p. 45). Jewel can hardly validly say that because its position on health and welfare was adverse to that of all the other employers the accord reached on the subject by joint negotiations was the product of an illicit business men-union combination. And what Jewel cannot validly say when the subject is health and welfare it cannot validly say just because the subject is market operating hours. Jewel indeed suffers from a self-confessed corporate paranoia that anyone who differs from it conspires against it (R. 379-380).

Quoting from *Interstate Circuit* v. *United States*, 306 U.S. 208, 227, the court below invokes the doctrine of "conscious parallelism" to support its conclusion (R. 697). There is, first, no factual predicate for application of the doctrine. For the short of it is that while all employers,

including Associated, entered into the agreement limiting market operating hours, none of the employers, including Associated, did so in any wise for reasons which paralleled the unions, but indeed actively sought to dissuade the unions from their position. Furthermore, whenever a union deals with more than one employer in the same industry, it may well be that a union demand is unopposed by some employers and opposed by others. But nothing is inferable from the concord with some and the discord with others. For the reasons for the union's demand, the resistance by some employers, and the acquiescence by other employers can be totally disparate. An infinite variety of strain and stress enters into the makeup of bargaining positions.[21] Included within the causes of variegation are differing apprajsal of economic self-interest, conflicting notions of the room for adjustment, dissimilar evaluation of the willingness and capacity to call and take a strike, the influence of internal political pressure (within both the union and corporate complex), and the human elements of pride, prestige, arrogance, stupidity, and miscalculation. "The difficulty is that solutions often require such a delicate balancing of conflicting interests—and interests within interests—that even a computer would have difficulty in handling all the variables."[22] A common position therefore by no means denotes common reasons, common interests, or common conduct. And a union need not be at loggerheads with all the employers in order to establish that it is acting independently of all employers.

Parallel action of itself, even were it shown to exist, does not therefore import concert. This Court, as it has explained, "has never held that proof of parallel business behavior conclusively establishes agreement or, phrased

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[21] See Fleming, *New Challenges For Collective Bargaining*, 1964 Wis. L. Rev. 426, 432-444.

[22] *Id.* at 433.

differently, that such behavior itself constitutes a Sherman Act offense"; " 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541. In this case, based on the findings that the employer group and the union group each "formulates its position independently" (R. 664-665) and that agreement was reached "after arm's length bargaining" (R. 672), it mocks the meaning of "conscious parallelism" to infer illicit concert. Concert is simply not inferable from parallel action resulting from independent decision.[23]

The bankruptcy of conjuring concert is finally shown by the statement of the court below that Associated and the unions interposed a "common defense" to the conspiracy charge (R. 697). A joint plea by persons that they are not conspirators can hardly be traduced into proof that they are. Especially is this so when all that is relied upon is "Associated's motion," granted by the court below, that "the Unions' brief stand as the brief of Associated and Bromann, its secretary". (R. 697, n. 5). The court below neglects to mention that in consenting to the grant of the motion the unions were at pains to state that "appellees in No. 14196 [the unions] wish it to be clearly and distinctly understood that their attorneys do not represent appellees in No. 14119 [Associated and Bromann], that the brief for appellees in No. 14196 is not being prepared in cooperation or consultation with appellees in No. 14119 or the latter's

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[23] *Winchester Theater Co.* v. *Paramount Film Dist. Corp.*, 324 F. 2d 652, 653-654 (C.A. 1); *Independent Iron Works* v. *United States Steel Corp.*, 322 F. 2d 656, 661 (C.A. 9); *Gold Fuel Service* v. *Esso Standard Oil Co.*, 306 F. 2d 61, 64 (C.A. 3); *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 297 F. 2d 199, 202-203 (C.A. 3), cert. denied, 369 U.S. 839. See also, Report of Atty. Gen. Natl. Comm. to Study the Antitrust Laws, 36-42 (1955); Turner, *The Definition of Agreement Under The Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962).

attorneys, and that appellees in No. 14196 are in no wise associated with appellees in No. 14119 in the conduct of this ligitation" (R. 688-689). It is a measure of the approach of the court below that it recites the motion but not the contents of the consent. And it is a measure of the error into which such undisciplined concert-conjuring can lead that, as stated by Associated and Bromann in their petition for a writ of certiorari, "all that" their reliance on the unions' brief "in truth evidenced . . . is Associated's and Bromann's impecunity. Unlike either the unions or respondent, who have ample financial means to conduct protracted and expensive litigation, Associated and Bromann simply do not have the wherewithal necessary to wage legal warfare."[24] But it would make no difference even if there were thorough concert in presenting a common defense. The "Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action. . . . ." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 375 U.S. 127, 136. Nor, we add, the judiciary.

In sum, all employers, including Jewel, yielded to the unions' demand on market operating hours and in compliance with it incorporated the limitation into the collective bargaining agreements. The surrender of the employers to the unions' demand can hardly be equated with connivance of the employers with the unions. Capitulation is not conspiracy. This is no case "where a labor organization is used by a combination of those engaged in an industry as the means or instrument for suppressing competition or fixing prices." *Philadelphia Record Co.* v. *Manufacturing Photo-Engravers Assn.*, 155 F. 2d 799, 803 (C.A. 3). On the contrary, as the District Court found, the "facts and circumstances are inimical to plaintiff's theory

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[24] P. 13, No. 321, October Term 1964, *Associated Food Retailers, et al.* v. *Jewel Tea Co.*

that the unions insisted on the restriction as the tool of he employer group and at their behest" (R. 672).

2. The labor exemption is destroyed if a bargaining agreement reached by joint negotiations alone suffices to remove its applicability.

The position adopted by the court below thus emerges stark and bare. It would find a business men-union combination—a conspiracy among and between them—simply in the fact of agreement reached as a result of common participation of employers and unions in joint negotiations. That position can hardly survive its statement. For it is in basic conflict with the concept of multi-party negotiations and the uniformity of agreements which naturally flows from it.

As this Court has held, the National Labor Relations Act expressly recognizes the legitimate interest "in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms" (*N.L.R.B.* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96); "This basis of bargaining has had its greatest expansion since enactment of the Wagner Act because employers have sought through group bargaining to match increased union strength" (*id.* at 94-95); and "Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining" (*id.* at 95). And since "avoiding the competitive disadvantages resulting from nonuniform contractual terms" is the very reason for being of multi-employer bargaining, it can hardly be a valid objection that identical agreements are an object and consequence of joint negotiations. Indeed, Jewel's own position is that no employer should have more favorable terms than any other employer

(*supra*, pp. 12-13). Uniformity in this field is fully consistent with the antitrust laws. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503-504 and n. 24, 507, n. 25; National Labor Relations Act, § 1, ¶ 2. Accordingly, joint negotiation and uniform collective bargaining agreements are not and do not evidence combinations of businessmen leagued with a union engaged in conduct violative of the antitrust laws. *California Sportswear & Dress Association, Inc.*, 54 FTC 835, 885-886; *Meier & Pohlman Furniture Co.* v. *Gibbons*, 233 F. 2d 296, 302 (C.A. 8), cert. denied, 352 U.S. 879; *Adams Dairy Co.* v. *St. Louis Dairy Co.*, 260 F. 2d 46, 49 C.A. 8); *Rossi* v. *McCloskey & Co.*, 149 F. Supp. 639, 640 (D.C.E.D. Pa.); Cox, *Labor and The Anti-Trust Laws —A Preliminary Analysis*, 104 Penn. L. Rev. 252, 271.

Another route reaches the same destination. In *Allen Bradley* this Court stated that we may assume that a bargaining agreement, "standing alone," would not violate the Sherman Act. 325 U.S. at 809. Forthright embracement of that assumption is inherent and inevitable granting the premise of decision in *Allen Bradley*. If the regulation of market operating hours is invalid at all, it would be so only because it is the product of activity by the unions to aid and abet business men in violating the antitrust laws. 325 U.S. at 801, 807, 808, 810. Any injunction against bargaining for, or striking to obtain, the marketing provision would have to be confined to "when such activities are carried on in combination and conspiracy with non-labor groups," and would not extend to "any of said activities when said activities are not in combination with non-labor groups . . ." *Allen Bradley* v. *Local Union No. 3, IBEW*, 164 F.2d 70, 75 (C.A. 2). This limitation of the injunction was required by the terms of this Court's remand in *Allen Bradley* ordering that the injunction be confined to "only those prohibited activities in which the union engaged in combination 'with any . . . non-labor group . . .'" 325 U.S.

at 812. See also, *Schatte* v. *International Alliance*, 182 F.2d 158, 167 (C.A. 9), cert. denied, 340 U.S. 827; *Pevely Dairy Co.* v. *Milk Wagon Drivers Union Local 603*, 174 F. Supp. 229 (E.D. Mo. E.D.). Accordingly, under any circumstances, the antitrust laws leave the unions free, so long as they act independently of a non-labor group, to bargain and strike for the market operating hours provision. Any controversy concerning it would clearly be a labor dispute within the meaning of the Norris-LaGuardia Act (*Railroad Telegraphers* v. *Ch. & N.W. R. Co.*, 362 U.S. 330; *Aetna Freight Lines, Inc.* v. *Clayton*, 228 F.2d 385, 386-387 (C.A. 2), cert. denied, 351 U.S. 950), and the strike would hence not be enjoinable. As this Court held in *Hunt* v. *Crumboch*, 325 U.S. 821, 824:

> It is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Antitrust laws. *Apex Hosiery* v. *Leader*, 310 U.S. 469, 502-503. A worker is privileged under congressional enactments, either acting alone or in concert with his fellow workers, to associate or to decline to associate with other workers, to accept, refuse to accept, or to terminate a relationship of employment, and his labor is not to be treated as "a commodity or article of commerce." Clayton Act, 38 Stat. 730, 731; Norris-LaGuardia Act, 47 Stat. 70; see also, *American Steel Foundries* v. *Tri-City Council*, 257 U.S. 184, 209.

And it would be stultifying to say that a provision for which a union may strike may not validly be incorporated in a collective bargaining agreement in lieu or settlement of the strike.[25]

The point can be sharpened. Assume that, instead of negotiating the limitation upon market operating hours

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[25] Cox, *Labor And The Antitrust Laws—A Preliminary Analysis*, 104 Penn. L. Rev. 252, 271; Dodd, *The Supreme Court And Organized Labor, 1941-45*, 58 Harv. L. Rev. 1018, 1051.

and incorporating it in to the agreement, the unions unilaterally adopt the same limitation and announce that, as the butchers' condition of working for the employer, the prescribed marketing hours must be observed by the employer in the meat department. The standard would thus be determined exclusively by the unions and its enforcement secured solely by the withholding of labor. No possible antitrust violation would exist, for workers "can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws." *Hunt* v. *Crumbach*, 325 U.S. 821, 824. This hypothetical situation—which in the instant case can readily be made into a reality—differs from the actual situation only in that, instead of unilaterally dictating the terms to the employers, the unions are willing to negotiate the terms and incorporate any ensuing accord into an agreement. It is surely not the point of the labor exemption that, instead of meeting and conferring in good faith with the employers concerning a union demand which affects them, the unions must engage in an incommunicado clubbing of the employers.

The gross shift from *Allen Bradley* indulged by the court below is further apparent from its direction to the District Court to enter "an injunction substantially as prayed in the complaint herein . . ." (R. 698). Paragraph 3 of the prayer would enjoin enforcement of any limitation upon market operating hours, and paragraph 4 would enjoin any strike or picketing "for the purpose of restricting plaintiff's hours of operation," with no qualification that either prohibition be confined to activity in concert with a non-labor group (R. 27). This blanket restraint is directly contrary to this Court's express edict in *Allen Bradley*.

In the realistic world in which the labor exemption must live, for this Court to say that labor activity is free of the Sherman Act when the union "acts alone" (325 U.S. at 810) of necessity means that a union may bargain and

strike and reach agreement in consummation of that activity. For if a union is not acting alone when it does that it generally cannot act at all. Put another way, an agreement secured by a union in fruition of collective bargaining, "with the right to strike at its core,"[26] is not the product of a conspiracy of business men to violate the antitrust laws aided by a union. Otherwise *Allen-Bradley* has no meaning and the labor exemption is dead.

C. The "Wisdom or Unwisdom, the Rightness or Wrongness, the Selfishness or Unselfishness" of the Unions' End Is Irrelevant to the Labor Exemption.

The decision below is a throwback to the days preceding the Norris-LaGuardia Act and that Act's infusion of the labor exemption to the antitrust laws with its contemporary meaning. "The committee reports on the Norris-LaGuardia Act reveal that many of the injunctions which were considered most objectionable by the Congress were based upon complaints charging conspiracies to violate the Sherman Anti-Trust Act." *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U.S. 91, 101. Furthermore, the plain basis for the decision below is the court's distate for the absence of night marketing and the translation of that distaste into a declaration of illegality. The labor exemption was designed to extirpate such judicial fiat. A "union's exemption from the Sherman Act is not to be determined by a judicial 'judgment regarding the wisdow or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.'" *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U.S. 797, 810-811.

It is necessary to insist upon this point. The notion that the legality of labor action under the antitrust laws

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[26] *Division 1287, Amalgamated Association* v. *Missouri*, 374 U.S. 74, 82.

depends upon the legitimacy of its purpose draws on section 6 of the Clayton Act which provides in part that "nothing contained in the antitrust laws shall be construed . . . to forbid or restrain individual members of . . . [labor] organizations from lawfully carrying out the legitimate objects thereof. . . ." As interpreted in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 469, "there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects, and engage in an actual combination or conspiracy in restraint of trade." This construction drew the sharp dissent of Justice Brandeis joined by Justices Holmes and Clark (*id.* at 484-486, footnotes omitted):

> This statute [the Clayton Act] was the fruit of unceasing agitation, which extended over more than twenty years, and was designed to equalize before the law the position of workingmen and employer as industrial combatants. Aside from the use of the injunction, the chief source of dissatisfaction with the existing law lay in the doctrine of malicious combination, and, in many parts of the country, in the judicial declarations of the illegality at common law of picketing and persuading others to leave work. The grounds for objection to the latter are obvious. The objection to the doctrine of malicious combinations requires some explanation. By virtue of that doctrine, damage resulting from conduct such as striking or withholding patronage or persuading others to do either, which, without more, might be damnum absque injuria because the result of trade competition, became actionable when done for a purpose which a judge considered socially or economically harmful, and therefore branded as malicious and unlawful. It was objected that, due largely to environment, the social and economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between workingman and employer; that, due to this dependence upon the individual opinion of judges, great confusion existed as to what purposes were lawful and what unlawful; and that, in any event,

Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands.

By 1914 the ideas of the advocates of legislation had fairly crystallized upon the manner in which the inequality and uncertainty of the law should be removed. It was to be done by expressly legalizing certain acts regardless of the effects produced by them upon other persons. As to them, Congress was to extract the element of injuria from the damages thereby inflicted, instead of leaving judges to determine, according to their own economic and social views, whether the damage inflicted on an employer in an industrial struggle was damnum absque injuria, because an incident of trade competition, or a legal injury, because, in their opinion, economically and socially objectionable. This idea was presented to the committees which reported the Clayton Act. The resulting law set out certain acts which had previously been held unlawful, whenever courts had disapproved of the ends for which they were performed; it then declared that, when these acts were committed in the course of an industrial dispute, they should not be held to violate any law of the United States. In other words, the Clayton Act substituted the opinion of Congress as to the propriety of the purpose for that of differing judges; and thereby it declared that the relations between employers of labor and workingmen were competitive relations, that organized competition was not harmful, and that it justified injuries necessarily inflicted in its course.

Thus *Duplex* expressed the idea, over the dissent of Mr. Justice Brandeis that Congress had repudiated it, that the test of the legality of labor action was its legitimacy as determined by a judge. But *Duplex* and its kin were brought down, and the dissent won the day, with the enactment of the Norris-LaGuardia Act.[27] "The Act does not

[27] *United States* v. *Hutcheson*, 312 U.S. 219, 235-236; *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U.S. 91, 102-103; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552, 562-563.

concern itself with the background or the motives of the dispute."[28] The view which prevailed is that "the area of economic conflict . . . had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts."[29] Judicial arbitrament was out. To repeat from *Allen Bradley*, a "union's exemption from the Sherman Act is not to be determined by a judicial 'judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.'" 325 U.S. at 810-811. And this commitment of normative judgment to private decision, forcefully expressed in the Norris-LaGuardia Act, is at the heart of the National Labor Relations Act as well. *Supra*, pp. 78-79; *infra*, pp. 108-109. It is central to national labor policy. Faithful to it, this Court has resisted even the most attractive of invitations to shape the law to its "policy predilections. . . ." *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 213.

In an antitrust proceeding, to judge the validity of labor action by its legitimacy is simply the rule of reason in a labor context. That means there is no labor exemption. For, *per se* violations aside, the rule of reason is the general standard by which the validity of every trade restraint is judged. To subject labor activity to it is to ask a court to decide whether the activity imposes an undue restriction on commercial competition, and, if it does, whether it is nevertheless justifiable because of the rightful demands of labor.[30] This is the direction in which Judge Thurman Arnold sought to go in 1939 when, as Assistant

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[28] *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552, 561.

[29] *United States* v. *Hutcheson*, 312 U.S. 219, 231.

[30] See Mr. Justice Brandeis' dissent in *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Association*, 274 U.S. 37, 58, which fell back on the rule of reason as the second line of defense after the Justice's primary position in *Duplex* had been rejected.

Attorney General in charge of the Antitrust Division of the Department of Justice, he instituted criminal antitrust proceedings based on his judgment as to whether the labor union was engaged in a "reasonable exercise of collective power" or an "unreasonable restraint."[31] Dean Harry Shulman strongly criticized the thesis underlying this approach,[32] concluding that it was in conflict with "the policy, steadily strengthened during the [Sherman] Law's fifty years, to withdraw the aims of labor action from the requirement of judicial approval or disapproval."[33] The Arnold demarche was put to an end by *United States* v. *Hutcheson*, 312 U.S. 219, one of the cases designed to spearhead it.[34] It is late in the day to return to it.

We do not wish to be misunderstood. We are firm in our conviction that our ends and means are entirely legitimate. We apologize for neither. We affirm both. Collective labor action to keep from working nights because the men prefer being home with their families needs no vindication. In our pecuniary society it is refreshing to see steadfast devotion to an aim which is not economic. The end served comes with high credentials even in a non-labor context.[35]

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[31] Quoted in Smith, Labor Law, 408 (2d ed., 1953), and in 5 LRRM 1148-1149.

[32] Shulman, *Labor And The Anti-Trust Laws*, 34 Ill. L. Rev. 769, 779-787 (1940).

[33] *Id.* at 787.

[34] 5 LRRM 1151.

[35] In upholding the hours-of-trading rule of the Chicago Board of Trade, this Court observed that (*Board of Trade* v. *United States*, 246 U.S. 231, 241):

> Every board of trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as

True, the consequence of not working at night is that some consumers who prefer night shopping are inconvenienced by its absence. But as the District Court found, in considering this case on the alternative hypothesis that the rule of reason was applicable, "the fact that some consumers would prefer longer than 54 hours during the week within which to buy fresh meat can hardly constitute the basis for holding a restriction on night hours to be an unreasonable restraint of trade" (R. 677). The Court of Appeals scoffs the District Court's disposition as summary (R. 694, n. 4). And that makes our precise point. The applicability of the labor exemption does not depend upon agreement with the District Court's approval or disagreement with the Appeals Court's disapproval. Judicial judgment of the merit of the labor aim is irrelevant.

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here, they tend to shorten the working day, or, at least, limit the period of most exacting activity.

The attempt of the court below to distinguish *Board of Trade* is a baseless exercise in identifying pointless differences to the exclusion of the vital principle. Petition for writ of certiorari, pp. 35-37. And see, *Stovall* v. *McCutcheon*, 107 Ky. 577, 54 S.W. 969, sustaining as reasonable an agreement among merchants to close their businesses at 6:30 p.m., except Saturdays, between May 15 and September 1.

The labor interest in trading hours, because of their inevitable impact on working hours, is evident from labor support of Sunday closing by legislation. *McGowan* v. *Maryland*, 366 U.S. 420, 435 (majority opinion of Chief Justice Warren), 500-501 (separate opinion of Mr. Justice Frankfurter). See also, *Spilka* v. *Retail Store Employees Union Local 880*, No. 709, 132, Court of Common Pleas, Cuyahoga County, Ohio, quoted at R. 439, upholding the legality of the store operating hours in Cleveland. Illinois decisions are to like effect. *Cielesz* v. *Local 189, Meat Cutters*, 25 Ill. App. 2d 491, 167 N.E. 2d 302; *Baker* v. *Retail Clerks*, 313 Ill. App. 432, 40 N.E. 2d 571.

IV. THE CONTROVERSY LIES WITHIN THE EXCLUSIVE PRIMARY JURISDICITON OF THE NATIONAL LABOR RELATIONS BOARD.

Based on its determination that regulation of market operating hours is designed to serve labor's interests in "how long and what hours members shall work, what work they shall do, and what pay they shall receive," the District Court concluded that it is part of "conditions of employment . . . " (R. 672-673). Based on its determination that setting market operating hours is an exclusive managerial prerogative, the Court of Appeals concluded that it "is not a condition of employment, contrary to the district court's finding" (R. 694). The question presented is whether either determination is within judicial competence or whether resolution of the issue lies instead within the exclusive primary jurisdiction of the National Labor Relations Board because it falls within the regulatory scope of the National Labor Relations Act.[36]

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[36] The Court may wish to consider whether it is unnecessary to reach this question because the controverted conduct is so clearly protected activity within the scope of the National Labor Relations Act or immune activity within the labor exemption of the Sherman Act that determination of the requirement of prior recourse to the agency may be inappropriate. Withholding decision was the course followed in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 332, n. 4, the Court concluding that it need not consider the question of the initial exclusive jurisdiction of the NLRB in that the Court's conclusion "on the merits . . . interprets the statutory authority of a collective bargaining representative to have such breadth that it removes all ground for a substantial charge that International, by exceeding its authority, committed an unfair labor practice." Similarly, the Court declined to consider whether a District Court had jurisdiction to review an NLRB representation determination without a showing of "unlawful action by the Board and resulting injury," the Court stating that the question "should not be decided in the absence of some showing that the Board had acted unlawfully." *Inland Empire District Council* v. *Millis*, 325 U.S. 697, 700. The question was thereafter decided in *Leedom* v. *Kyne*, 358 U.S. 184, when that showing was made.

Analysis begins with the reach of the National Labor Relations Act. Its focus is wages, hours, and working conditions. It is premised on seeking industrial stability "by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees" (NLRA, § 1, ¶ 4). To this end the status of a union as the majority representative of employees in an appropriate unit confers on it exclusive bargaining authority on their behalf "in respect to rates of pay, wages, hours of employment, or other conditions of employment" (§ 9(a)). To the status of the union is added the reciprocal obligation of employers and unions to bargain with each other in good faith (§§ 8(a)(5), 8(b)(3)). Their duty to treat with one another, like the union's status as the representative, extends to "wages, hours, and other terms and conditions of employment" (§ 8(d)). And "rates of pay, hours, and working conditions" defines as well the field within which governmental mediation facilities are provided, and the exertion of "every reasonable effort" by employers and unions is adjured, "to reach and maintain agreements" (§§ 201(b), 204(a)(1)).

The field thus pervasively defined is the precise milieu within which contractual regulation of market operating hours exists. Negotiation of market operating hours subsumes every element of wages, hours, and working conditions (*supra*, pp. 63-74), and is therefore a mandatory subject of collective bargaining because of its integral relationship to these matters.[37] Negotiation is obligatory but the content of the bargain is left to the parties subject only to the requirement that they treat with each other in good faith. Accordingly, whether an agreement should

[37] *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342; *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283; *N.L.R.B.* v. *Katz*, 369 U.S. 736.

regulate market operating hours "is an issue for determination across the bargaining table" (*N.L.R.B.* v. *American National Ins. Co.*, 343 U.S. 395, 409); " . . . Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences" (*N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 488).[38] And to secure accord part of the means protected by the National Labor Relations Act is the right to strike on the union's part and the exertion of countervailing economic pressure on the employer's side.[39]

In end and means, therefore, the subject of market operating hours is within the protected ambit of the National Labor Relations Act. If not, it is then necessarily within the rubric of activity prohibited by that Act. The unions have insisted in collective bargaining upon the limitation on market operating hours. To insist upon a non mandatory subject is to refuse to bargain, for "it is lawful to insist upon matters within the scope of mandatory bargaining *and unlawful to insist upon matters without*. . . ." *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (emphasis supplied). The NLRB order which ensues would require cessation from that insistence (*Wooster Division of Borg-Warner Corp.*, 113 NLRB 1288, 1297, affirmed, 356 U.S. 342), as well as from auxiliary conduct like strikes designed to effectuate it (*International Longshoremen's Association*, 118 NLRB 1481, 1483, remanded, 277 F.2d 681 (C.A.D.C.); see also *Local 164, Brotherhood of Painters*, 136 NLRB 997, 1001-03, enforced, 293 F.2d 133 (C.A.D.C.), cert. denied, 368 U.S. 824).

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[38] See also, *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, 295; *Terminal R.R. Assn.* v. *Railroad Trainmen*, 318 U.S. 1, 6. And see, *supra*, pp. 78-79.

[39] *Division 1287, Amalgamated Association* v. *Missouri*, 374 U.S. 74; *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 489; *N.L.R.B.* v. *Lion Oil Co.*, 352 U.S. 282, 291.

One way or the other, therefore, the controversy can be conclusively determined by the Board, either to validate or illegalize the unions' conduct, and effectively to stop it if illegal. And the bedrock determination whether market operating hours is a mandatory or permissive subject of collective bargaining necessarily belongs initially to the Board. The court below directs entry of an injunction substantially as prayed in the complaint (R. 698). The complaint requests that "the restriction on hours . . . be declared illegal, null and void, and that defendants be enjoined from enforcing said restriction in [the collective bargaining agreements] . . . or any other rule, contract, or restriction having a similar effect or purpose" (R. 27). Were the Board to find that marketing hours is a mandatory subject of negotiation, it would require the unions and Jewel to bargain with each other on the subject should either refuse to do so. Thus the District Court is instructed to enjoin as a violation of the Sherman Act what the Board may compel as a duty under the National Labor Relations Act. This is an impossibility. A principal function of the doctrine of primary jurisdiction is to avoid just such "uncoordinated and conflicting requirements." 3 Davis, Admin. Law Treatise, § 19.01, p. 5 (1958). "Otherwise, we might have the spectacle of courts throughout the country enjoining practices as violations of the antitrust laws even though the agency specifically authorized to deal with them has determined or may decide, subject to judicial review, that such practices serve the interests" of the regulatory policy committed to the agency's administration. *S. S. W., Inc.* v. *Air Transport Ass'n of America*, 191 F.2d 658, 663 (C.A.D.C.). See also, von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 965-966 (1954).

Avoidance of such collision is the commanding reason underlying preemption of state action in favor of adjudication by the Board and it applies in the present context as well. Had the instant complaint been filed in a state

court alleging a violation of a state antitrust statute, dismissal of the complaint in deference to the exclusive jurisdiction of the Board would be required. This is the teaching of this Court's decisions in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, and *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283. *Garmon* teaches that where activity is *arguably* subject to the protection of Section 7 or the prohibition of Section 8 of the National Labor Relations Act, exclusive competence to decide the question resides with the National Labor Relations Board.[40] *Oliver* teaches that state prohibition is excluded " 'even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade' " (358 U.S. at 297).[41]

The rationale which requires a state court to defer to the jurisdiction of the Board applies equally to a federal court. *Garmon* itself states that "When an activity is arguably subject to § 7 or § 8 of the Act, the States *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board . . . " (359 U.S. at 245, emphasis supplied). This has long been settled; indeed, the original displacement of the state courts was based on the fact that not even a federal court could act. "The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so. * * * And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action." *Garner* v. *Team-*

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[40] See also, *Local 20, Teamsters* v. *Morton*, 377 U.S. 252; *Local 100, United Association* v. *Borden*, 373 U.S. 690; *Local 207, Bridge Workers* v. *Perko*, 373 U.S. 701; *MEBA* v. *Interlake Steamship Co.*, 370 U.S. 173.

[41] See also, *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 472-473, 479, 481.

sters Union, 346 U.S. 485, 491. See also, *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 479 and n. 8; *Aetna Freight Lines, Inc.* v. *Clayton*, 228 F. 2d 385, 389 (C.A. 2), cert. denied, 351 U.S. 950. For action by a federal court, no less than by any other tribunal, creates "potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, . . . of inconsistent standards of substantive law and differing remedial schemes" (*Garmon*, 359 U.S. at 242).

Nor does it make a difference that the source of law invoked in the federal court is the Sherman Antitrust Act. The provision of the collective bargaining agreement at issue in *Oliver* pertained to minimum equipment rental of leased vehicles. The Court found the provision to be a mandatory subject of collective bargaining because it was designed to maintain the "basic wage structure established by the collective bargaining agreement" and to prevent "progressive curtailment of jobs" (358 U.S. at 293-294). While the provision in *Oliver* was attacked via *state* antitrust law, whereas the provision here is attacked via *federal* antitrust law, the difference in the source of the attack cannot alter the containment of the subject within the scope of mandatory collective bargaining. Whether it is within this scope depends solely upon whether it "is a subject within the phrase 'wages, hours, and other terms and conditions of employment' which defines mandatory bargaining." *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349. It is evident that the minimum equipment rental provision in *Oliver* would not be any less a subject of mandatory collective bargaining had the suit been instituted in a federal district court based on the federal antitrust laws rather than in an Ohio court based on the state antitrust laws. And the same must be true of the marketing provision in this case.

To be sure, in *Oliver*, the Court stated that "federal law sets some outside limits (not contended to be exceeded

here) on what their [the union's and employer's] agreement may provide, see *Allen Bradley Co.* v. *Local Union*, 325 U.S. 797; cf. *United States* v. *Employing Plasterers Ass'n.*, 347 U.S. 186, 190." 358 U.S. at 296. But the condemned aspects of the agreements in *Allen Bradley* and *Plasterers* pertained to compacts among business men to exclude competitors from the market. In *Allen Bradley*, for the purpose of maintaining price and market control, business men within New York City were limited in the persons to whom they could sell and from whom they could buy, and entry of products from outside New York City was barred (325 U. S. 797, 799-800); in *Plasterers*, out-of-state contractors were prevented from doing business in the Chicago area and entry of new local contractors was circumscribed (347 U. S. 186, 188). These were thus trade restraints effectuated by a combination of business men, aided by a union, in which the activity did not directly serve a collective bargaining objective and was related to wages and work *only* in the sense that the greater profits realized because of the activity enabled the employers to pay better wages and provide more work. The National Labor Relations Act does not require bargaining on a proposal to exclude competitors from the market or to fix prices on the theory that diminution in competition will make the companies more prosperous and thus enable them to increase wages.

But in this case, as in *Oliver*, the agreement pertains directly to a collective bargaining subject, and here, as there, the National Labor Relations Act controls. At the least the subject of the agreement is surely arguably within the regulatory scope of the National Labor Relations Act and hence the National Labor Relations Board alone is empowered to determine the question in the first instance. This is the nub of the matter. The "phrase 'wages, hours, and other terms and conditions of employment' which defines mandatory bargaining" (*N.L.R.B.* v. *Wooster Divi-*

sion of Borg-Warner Corp., 356 U.S. 342, 349) is not self-explanatory. Like other instances of "specific application of a broad statutory term," determining its content and bounds "has been assigned primarily to the agency created by Congress to administer the Act"; it " 'belongs to the usual administrative' routine of the Board." *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 130, 131. Especially is this so because the scope of mandatory bargaining is not static but unfolds to correspond with a developing economy. *Inland Steel Co.* v. *N.L.R.B.*, 170 F.2d 247, 254 (C.A. 7), cert. denied, 336 U.S. 960. Informed adjudication requires therefore initial determination by the agency attuned by experience and insight to the nuances of the industrial environment enveloping the question and deference on judicial review to the judgment it expresses.[42] Primary jurisdiction preserves these values by requiring prior recourse to the agency as a precondition to an antitrust action which crosses the regulatory statute. As with the Federal Aviation Act, so with the National Labor Relations Act, "proceedings before the Board . . . will produce a record, findings of fact and conclusions of law as to whether the specific practices complained of are legal or illegal under the . . . Act—all of which will be subject to judicial review under that Act." *S.S.W., Inc.* v. *Air Transport Assn. of America*, 191 F.2d 658, 664 (C.A.D.C.). Without such prior recourse responsible accommodation of antitrust policy with regulatory policy cannot be achieved. "Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation." *F.M.B.* v. *Isbrandtsen Co.*, 356 U.S. 481, 499.

The principles underlying the preemption of state action thus control here as well. As has been observed, "even

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[42] *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 235-236; *N.L.R.B.* v. *Truck Drivers Local Union*, 353 U.S. 87, 96; *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 130-131; *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194.

though the thinking about" preemption in the context of the National Labor Relations Act "has focused upon the problem of federalism, the problem still continues to be in part one of primary jurisdiction. When relief is sought in a federal court instead of in a state court, the problem of whether the court should defer to the Board is much the same." 3 Davis, Admin. Law Treatise, § 19.05, p. 23 (1958). "The principal reason behind the doctrine [of primary jurisdiction] is recognition of the need for orderly and sensible coordination of the work of agencies and of courts." *Id.* at 5. ": . . . [B]efore the particular agency has defined the particular regulatory policy in the particular case, the courts are not well equipped to make initial decisions involving accommodation of the antitrust policy to the regulatory policy." *Id.* at 25. And so, "A court should not act without knowing the agency's specific regulatory policy with respect to the particular problem in the particular circumstances." *Id.* at 27.

Once the agency determination as finalized on judicial review has been made, the courts in an antitrust action may enforce the Sherman Act to whatever extent is consistent with it. In this case, were the Board to decide (with judicial approval on review of its action) that market operating hours is a mandatory subject of collective bargaining, the matter ends. "It is generally recognized that an act legal under the regulatory statute cannot constitute a violation of the antitrust laws." von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 944 (1954). On the other hand, were the Board to decide (with judicial approval on review of its action) that insistence upon contractual regulation of market operating hours is an unfair labor practice because the subject is within the scope of permissive rather than mandatory bargaining, the way is cleared for consistent antitrust action. Injunctive relief would not be necessary; the Board's cease-and-desist order would be fully effective to stop the prohibited con-

duct; indeed, the administrative remedy is superior, for unlike a judicial injunction (*supra*, pp. 98-99), it would not be circumscribed by the limitation that it can reach union action only when taken in combination with a non-labor group. It therefore hits the target cleaner and harder. But the question of treble damages would remain. Of course damages would be available, not for violation of the National Labor Relations Act, but only for transgressing the antitrust laws, and to show insistence upon a permissive subject of bargaining would obviously not establish a Sherman Act offense. The plaintiff would have to demonstrate (1) that the union was not acting in its self-interest free of a combination of business men violating the antitrust laws, in order to escape the labor exemption, and (2) that the questioned conduct constituted an unreasonable restriction upon commercial competition, in order to escape the rule of reason. But the present relevant point is simply that the opportunity to make this showing still exists once the administrative route has been travelled to a conclusion which permits consistent application of the Sherman Act.

For a court to decline or defer jurisdiction over an alleged antitrust violation in favor of an agency's determination of interrelated cognate questions falling within the purview of a regulatory statute is of course not new doctrine. Recourse to the agency has been required under the Interstate Commerce Act,[43] the Shipping Act,[44] the Packers and Stockyards Act,[45] and the Federal Aviation

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[43] *Keogh* v. *Chi. & N.W. Ry. Co.*, 260 U.S. 156; cf., *United States* v. *West, P.R.R. Co.*, 352 U.S. 59.

[44] *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474; *Far East Conference* v. *United States*, 342 U.S. 570; *Carnation Co.* v. *Pacific Westbound Conference*, 336 F. 2d 650 (C.A. 9); cf., *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 496-500.

[45] *McClenghan* v. *Union Stock Yards Co.*, 298 F. 2d 659 (C.A. 8).

Act.[46] This Court has stressed the applicability of the doctrine of primary jurisdiction to situations in which "administrative uniformity" and "administrative experience" were requisite.[47] "That doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme."[48] These considerations are decisive here. Under the National Labor Relations Act, "Congress has expressed its judgment in favor of uniformity" (*Guss* v. *Utah Labor Relations Board*, 363 U.S. 1, 10 11), and the "unifying consideration" of this Court's "decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized konwledge and cumulative experience" (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 242). The doctrine of primary jurisdiction should therefore apply to claimed violations of the Sherman Act which are arguably within the scope of the National Labor Relations Act. Prior resort to the Board is especially appropriate because the Sherman "Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, n. 7.

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[46] *Pan American World Airways* v. *United States*, 371 U.S. 296; *S.S.W., Inc.* v. *Air Transport Ass'n. of America*, 191 F. 2d 658 (C.A.D.C.).

[47] *United States* v. *Radio Corp. of Amer.*, 358 U.S. 334, 347-348.

[48] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353.

CONCLUSION

For the reasons stated the judgment should be reversed and the case remanded with instructions to affirm the District Court's order dismissing the complaint.

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APPENDIX A

Relevant Statutory Provisions

1. *The Sherman Antitrust Act* (26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. §§ 1, 2):

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

2. *The Clayton Act* (38 Stat. 731, 738, 15 U.S.C. § 17, 29 U.S.C. § 52):

Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profits, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

Sec. That no restraining order or injunction shall be granted by any court of the United States, or by a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or be-

tween employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the facts specified in this paragraph be considered or held to be violations of any law of the United States.

3. *The Norris-La Guardia Act* (47 Stat. 70, 29 U.S.C. § 101):

Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are

herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

* * *

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act.

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value.

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State.

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence.

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified.

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Sec. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

* * *

Sec. 13. When used in this act, and for the purposes of this act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

4. The *National Labor Relations Act* (61 Stat. 136, 29 U.S.C. § 151 *et seq.*):

Section 1. * * * The inequality of bargaining power between employees who do not posses full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

* * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * *

Sec. 8 (a) It shall be an unfair labor practice for an employer—

• • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a). . . .

• • •

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

• • •

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

• • •

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any

unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . .

5. *Title II, Labor Management Relations Act, 1947* (61 Stat. 152, 29 U.S.C. § 171):

Sec. 201. That it is the policy of the United States that—

* * *

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes. . . .

* * *

Sec. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements. . . .

APPENDIX B

The Regulation of Market Operating Hours By Collective Bargaining Agreement in Areas Other Than Chicago

1. Operating hours of both grocery and meat departments in food stores in Cuyahoga County, Ohio (which includes Cleveland and has a population of 1,647,895),[49] are 9:00 a.m. to 6:00 p.m., Monday through Thursday, and 8:00 a.m. to 6:00 p.m., Friday and Saturday (R. 426, 428-429, 433-434, 438). These operating hours have existed at least since 1945, except that before 1952 the hours on Wednesday were 9:00 a.m. to 1:00 p.m. (R. 434-435). The operating hours are set by the collective bargaining agreements between Retail Store Employees Union Local 880 and District Union 427, Amalgamated Meat Cutters and Butcher Workmen of North America, on the one hand, and Cleveland Food Industry Committee and Great Atlantic and Pacific Tea Company, on the other (R. 428, 433-434, 438). The agreement between Retail Store Employees Union Local 880 and Cleveland Food Industry Committee provides that (def. ex. 23, art. II):

> STORE HOURS (Cuyahoga County)—Store operating hours in Cuyahoga County shall be as follows: Monday, Tuesday, Wednesday and Thursday, 9 a.m. to 6 p.m.; Friday and Saturday, 8 a.m. to 6 p.m.

In the six stores within Cuyahoga County in which the meat department employees are represented by District Union 427 but the grocery clerks are unrepresented, the meat department ceases operation at 6:00 p.m. and a sign is posted at the meat department stating that the 6:00 p.m. closing is pursuant to agreement with District Union 427 (R. 436-437).

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[49] U.S. Bureau of Census, Census of Population: 1960, Vol. 1, Characteristics of Population, Part A, Number of Inhabitants, p. 37-15 (U.S. Gov. Print. Off., 1961).

Outside Cuyahoga County, in the Ohio counties of Lake, Ashtabula, and Lorain, the store operating hours are 9:00 a.m. to 6:00 p.m., Monday through Thursday, 8:00 a.m. to 9:00 p.m., Friday, and 8:00 a.m. to 6:00 p.m., Saturday, and in the Ohio county of Medina the store operating hours are 9:00 a.m. to 6:00 p.m., Monday through Wednesday, 8:00 a.m. to 9:00 p.m., Thursday and Friday, and 8:00 a.m. to 6:00 p.m., Saturday (R. 433-434). The agreement between Retail Store Employees Union Local 880 and Cleveland Food Industry Committee provides that (def. ex. 23, art. II):

> STORE HOURS (Outside County)—Store operating hours outside Cuyahoga County shall remain as presently constituted provided, however, that any employer who feels he must change hours to meet major competition will give the Union two weeks written notice of his intention before changing.

The population of Lake, Ashtabula, Lorain, and Medina Counties is 524,582.[50]

2. The collective bargaining agreement between Food Industry, Inc., and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local Union No. 81, covering meat markets in King and Kitsap Counties, Washington, which includes the principal city of Seattle, Washington, provides that (def. un. ex. 25, sec. 2 C, D):

> . . . there shall be no selling or delivery of fresh meat before 9:00 a.m. or after 6:00 p.m. or on Sundays or holidays, nor, except within these hours shall there be any soliciting in person or by telephone for sales of fresh meat . . .
>
> Customers, except those at the counter prior to 6:00 p.m., shall not be sold fresh meat after 6:00 p.m.

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[50] *Id.* at pp. 34-45, *supra*, p. 127, n. 49.

The collective bargaining between Wholesale and Retail Fish Dealers of Seattle, Washington, and Retail Fish Workers Local 81, Amalgamated Meat Cutters and Butcher Workmen of North America, provides that (def. ex. 26, § 2):

> No market shall be open before 9:00 A.M. or remain open after 6:00 P.M., or on Sundays or Holidays.

The population of King and Kitsap counties is 1,019,190.[51]

3. The agreement between Food Industry, Inc. and Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 151, covering meat markets in Snohomish County, Washington, which includes the principal city of Everett, Washington, provides that (def. ex. 27, § II 3, 4):

> . . . there shall be no selling or delivering of fresh meat before 9:00 A.M. or after 6:00 P.M., or on Sundays or holidays, nor, except within these hours shall there be any soliciting in person or by telephone for sales of fresh meat . . .
>
> Customers, except those at the counter prior to 6:00 P.M. shall not be sold fresh meat after 6:00 P.M.

The population of Snohomish County is 172,199.[52]

4. The collective bargaining agreement at Butte, Montana, between Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 333, and Silver Bow Employers' Association, provides that (def. ex. 28, art. X, § 5):

> There shall be no meat, meat products, poultry, fish, or any other article coming under the jurisdiction of

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[51] *Id.* at p. 49-11, *supra*, p. 127, n. 49.

[52] *Ibid.*

> the Butte Meatcutters' Union No. 333 in any type meat case, is to be sold or handled after the hours of 6:00 P.M. or before 8 A.M.

The population of Butte, Montana, is 27,877.[53]

5. At Anaconda, Montana, the collective bargaining agreement between Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 384, and Meat Dealers of Anaconda, Montana, provides that (def. ex. 29, art. 1(d)):

> Meat cutters, apprentices or meat wrappers shall be employed in meat markets between the hours of nine o'clock A.M. (9:00 A.M.) and six-thirty o'clock P.M. (6:30 P.M.) except as specified in Article Five.
>
> There shall be no meat, meat products, poultry, fish or any other article coming under the jurisdiction of the Anaconda Butcher's Union, Local #384, in any type meat case or to be sold or handled after the hours of six-thirty o'clock P.M. (6:30 P.M.) or before nine o'clock A.M. (9:00 A.M.) except as provided in Sections (a) through (d) of Article Five.

The exception in Article Five authorizes overtime "to be worked only in cases of emergency . . . ." The population of Anaconda, Montana is 12,054.[54]

6. The collective bargaining agreement with Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union 114, covering retail meat markets in St. Paul, Minnesota, and vicinity, provides that "Monday through Friday nights until 9 P.M. shall be the only scheduled night operation under this Agreement. All markets shall close at 6 P.M. on Saturday" (def. ex. 30, p. 3). The population of St. Paul, Minnesota is 313,411.[55]

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[53] *Id.* at p. 28-14, *supra*, p. 127, n. 49.

[54] *Id.* at p. 28-14, *supra*, p. 127, n. 49.

[55] *Id.* at 25-30, *supra*, p. 127, n. 49.

7. At Kenosha, Wisconsin, until 1961, the collective bargaining agreement between Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union 283, and Jewel and other employers, as interpreted by an arbitrator, had provided that "the sale of fresh meat is restricted to the hours of 7:00 A.M. to 6:00 P.M. Monday through Saturday, except on Friday night between the hours of 9:00 A.M. to 9:00 P.M." (R. 350-351). In 1961 a change in the agreement was negotiated to permit unlimited hours of operation (R. 349, 351). The population of Kenosha is 67,899.[56]

[56] *Id.* at p. 51-11, *supra*, p. 127, n. 49.